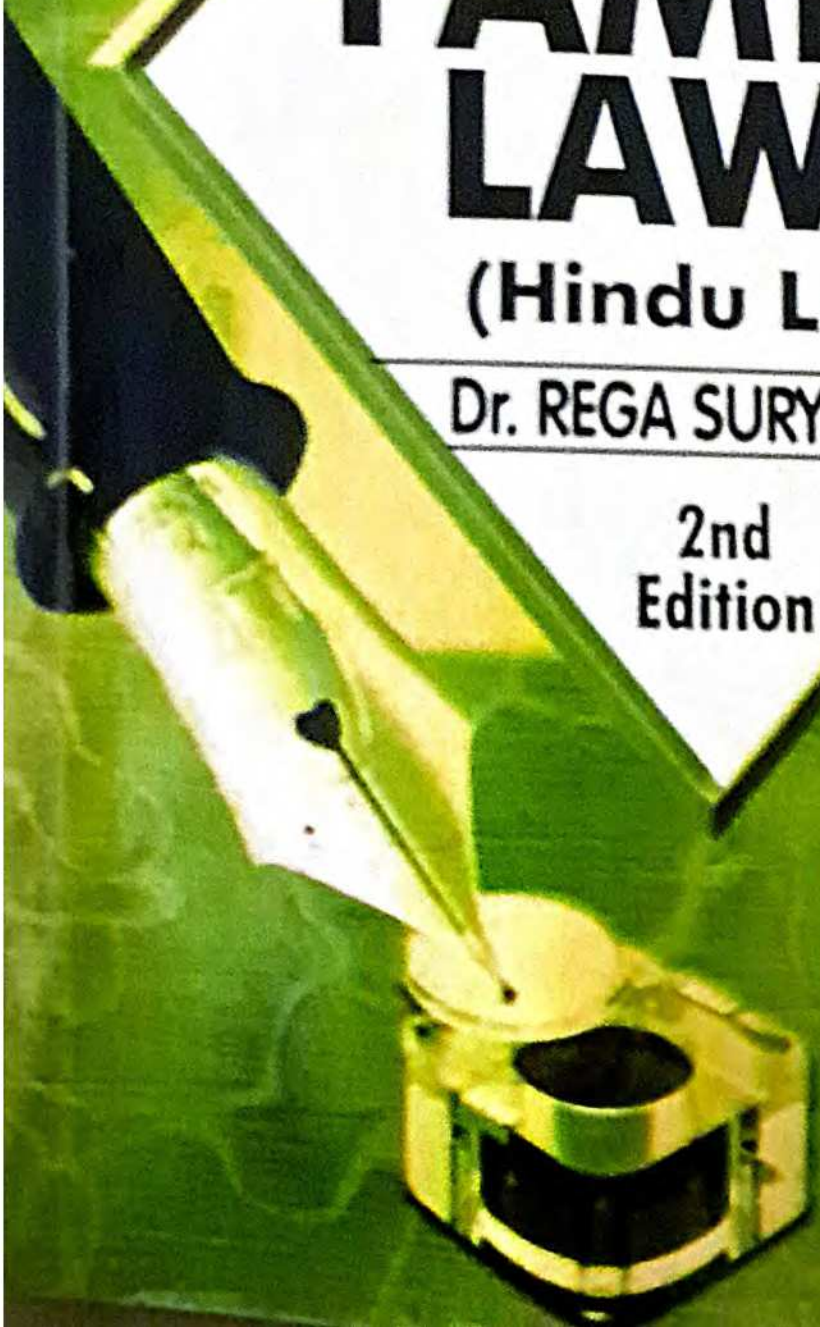
ASIA LECTURE SERIES

Lectures on FAMILY LAW-I

(Hindu Law)

Dr. REGA SURYA RAO

2nd Edition



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Preface

I would not probably have had the urge to write law books, but for the profound inspiration and unceasing encouragement of my beloved teachers Dr. P. Koteswar Rao, Prof. of Law (Retd.), S.V. University, Dr. K. Vishnu Murthy, Prof. of Law (Retd.), Kakatiya University, my guides Dr. N.S. Jagannadha Rao, LL.M., Ph.D., D.Lit. (Law); Prof. of Law, Berhampur University & Dr. B.S. Murty, Prof. of Human Resource Management, Andhra University (Dr. N.S. Jagannadha Rao is the first recepient of the D.Lit. in Law in the States of Orissa, Andhra Pradesh and some other states), my eldest brother Prof. Rega Jaganmohan Rao, Prof. of Law (Retd.), Andhra University and my wife, Mrs. Balivada T. Gowri, Advocate. The urge was reinforced, when I began my teaching career in February, 1986 in the well reputed and prestigious institution of Legal Studies, Sir C.R.R. Law College, Eluru, A.P., under the late Shri Ravi Purnachandra Rao, Founder Principal, who strove hard for the institution to scale loftier heights. The stimulus to this urge was provided by my students which persuaded me to write books useful to the Law Students.

My maiden ventures, 'Elements of Law of Torts' and 'Outlines of Indian Legal and Constitutional History' and the Study Material on 22 Subjects of Law published during 1993-99 by Arunodaya Publications, Eluru, A.P., received overwhelming response in a short span of time and drew the attention of Asia Law House, Hyderabad, a leading publisher of law books in India, who came forward to publish my works on various subjects.

I have dealt with the present subject Family Law-I in as simple and lucid a way as possible and as comprehensively as possible keeping in view, the requirements of students taking B.G.L./B.A.L./B.L./LL.B. (3 years and 5 years courses) examinations from different Universities. I have covered in this subject, the topics of great importance viz. marriage and divorce; adoption and maintenance; minority and guardianship among Hindus; Hindu Joint Family, the laws of Testamentary and Intestate Succession among Hindus.

An attempt is made in this work to enlighten the students about presenting relevant answers effectively, if the same question is asked in different forms and also to answer appropriately the questions on 'case comment' under Part-C. I welcome suggestions and advice from legal scholars and students for the improvement of this book.

I must mention here my irredeemable indebtedness to my sister-in-law and brother, Smt. Nirmala and Prof. Rega Jaganmohan Rao., my father-in-law, late Shri Balivada Sankara Rao., Dy. Collector (Retd.) and my mother-in-law Smt. Girija Sankar Rao, Shri S. Prasada Rao, Joint Commissioner of Labour (Retd.), A.P., Hyderabad., Shri V. Bangar Raju, Ex-Chief Manager, Hindustan Shipyard Ltd., Visakhapatnam., Shri V.V.N. Prasad, Secretary, Managing Committee, Sir C.R.R. Institutions and Shri K. Jawaharlal, Member, Governing Body, Sir C.R.R. Institutions, Eluru, who are collectively and independently instrumental for what I am now. I owe duty to thank my wife Mrs. Balivada T. Gowri, Advocate and my two sons Srinivas Uday Kiran and Srinivas Arun Kiran but for whose encouragement and co-operation, I could not have been in a position to complete this work. I acknowledge my heartfelt thanks to Shri Sunil Gogia, Shri Anil Gogia, Sri Arun Gogia. and Staff Members of Asia Law House, Hyderabad for their encouragement and co-operation in getting this work published. I would fail in my duty if I did not acknowledge my gratitude to the authors, whose works I have consulted and whom I have quoted in this book.

Above all it must be the hidden truth that the love, affection, blessings and benedictions of my beloved parents late Shri Rega Appa Rao and Smt. Kantha Ratnam, the sole reason for my gradual academic elevation—

-- Author

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Lecture – I: Introduction

Laws may be personal laws or Territorial laws. Personal law is applicable to the people of a particular religion viz., Hindu, Muslim or Christian. For instance, the Hindu Marriage Act, 1955 is applicable to the Hindus. Similarly, the Dissolution of Muslim Marriage Act, 1939 to the Muslims and the Christian Marriage Act 1872 to the Christians. The Territorial Law, on the other hand, is applicable to the people of the whole territory/country. Eg. The Indian Succession Act, 1925, The Indian Contract Act, 1872 etc., which are applicable to all irrespective of the religion i.e., Hindus, Muslims, or Christians etc.

The present subject, Family Law-I deals with the personal laws. Personal law means a particular branch of law applicable to those, who profess a particular religion. Eg. Hindus, Muslims, Christians etc. Family is a basic unit of societal fabric. It is found in any community. According to Burgess and Lockey "family is a social group of persons united by the ties of marriage, blood or adoption; consisting of a single household, interacting and intercommunicating with each other in their respective social roles of husband and wife, mother and father, son and daughter, brother and sister creating a common culture". Family law deals with the personal relations of husband and wife, parent and child etc. For the purpose of the study, the provisions relating to the marriage, divorce, adoption, maintenance etc. in respect of the Hindus, Muslims and Christians are discussed in Family Law-I. The other branch, Family law-II, which is prescribed for the study as a separate subject, deals with the law relating to property relations known as "the law of Succession" or "the Law of Testamentary and Intestate Succession". It deals with property relations of husband and wife, parent and child etc.

This lecture covers the following heads:

1. Who is a Hindu?
2. Sources of Hindu Law.
3. Schools of Hindu Law.

1. WHO IS A HINDU

Meaning and Definition: The term "Hindu" is derived from the Greek word "Indoi". The Greeks used to call the inhabitant of the "Indus Valley" as "Indoi". The law, which governs the Hindus is called "Hindu Law". Eg. The Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Hindu Adoptions and Maintenance Act, 1956; the Hindu Minority and Guardianship Act, 1956 etc.

According to ancient Hindu Texts, a Hindu is born and cannot be made. In other words, the status of a person as Hindu is determined by his/her birth to Hindu parents. However, this view is not valid legally since a person can become a Hindu by Conversion to Hinduism. Similarly, a Hindu can destroy his/her status as Hindu by conversion to Christianity (to become a Christian) or Islam (to become a Muslim/ Mohammedan). Therefore, it is made clear that Hindus are not only born but also made. Therefore, the term 'Hindu' includes "those born as Hindus and also those who become converts to Hinduism". Hindus are therefore born as well as made and thus the applicability of Hindu Law is not restricted or confined to those persons only who are Hindus by birth. Its application has been extended to those persons also who have accepted the Hindu religion or who convert to Hinduism. A non-Hindu may renounce his religion and become Hindu by conversion by any of the three methods:

a) if he performs the ceremony of conversion prescribed by the caste or community to which he converts;

b) if he expresses an intention to become a Hindu and actually lives as a Hindu and the community or caste into the fold of which he is ushered in accepts him as a member of

that community or caste;

c) if he declares that he is a Hindu and lives as a Hindu.

It is very difficult to define the term "Hindu" in terms of Hindu religion. Hindu is one, who is brought up as Hindu. However, from the point of view of the application of Hindu Law under Section 2 of the Hindu Marriage Act, 1955, Section 2 of the Adoption and Maintenance Act, 1956 and Section 3 of the Hindu Minority and Guardianship Act, 1956, the following persons are regarded as Hindus and are governed by the Hindu law. In other words, Hindu law is applicable to the following persons:

a) any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

b) any person who is a Buddhist, Jaina, or Sikh by religion, and

c) any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be:

a) any child legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

b) any child, legitimate, or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina, or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

any child, legitimate, or illegitimate who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu,

Jaina or Sikh; and

c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

As stated above, a Hindu may be subdivided into the following categories namely:

1. Hindu by Religion.
2. Hindu by Conversion (Converts and Reconverts); and
3. Hindu by Birth.

1. Hindu by Religion: Two types of persons fall under this category: (a) Those who are originally Hindus, Jains, Sikhs or Buddhists by religion, and (b) Those who are converts or reconverts to Hindu, Jain, Sikh or Buddhist religion.

Any person, who is Hindu by religion in any of its forms and developments either by practising or by professing it is a "Hindu". It is very difficult to define what is Hinduism. An attempt to define "Hindu" was made by *Gajendra Gadkar, J* in *Shastri vs. Muldas*, 1966 SC 1119 from the words of eminent scholars and writers of Hindu religion (namely Radhakrishna, Tilak, Monier Williams and Max Muller) quoted with approval the following passage from Tilak's Gitarahasya:

"Acceptance of the Vedas with reverence, recognition of the fact that means and ways of salvation are diverse and realisation of the truth that number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion".

Any person, who has faith in the above fundamental principles is regarded as a Hindu by religion. As the time passed, the Hindu religion has undergone several changes. As a consequence of reforms and counter - reforms that took place, different forms of Hindu religion viz. Arya Samaj, Brahma Samaj, Veera Shaiva, Lingayat, Satsangi etc. came into existence.

2. Hindu by Conversion (Converts and Reconverts): Hinduism recognizes conversion and Hindu Law is applicable to the converts to Hinduism from other religions. "Conversion is a process,

by which a person gets converted from one religion to another. by performing the formalities/ceremonies, if any prescribed for the conversion. After conversion, he/she is called "Convert". A non-Hindu can become a Hindu by fulfilling the formalities/ undergoing the ceremonies if any prescribed for the conversion. Similarly, if a convert reconverts to another religion, he is called "reconvert" Eg.:- "A Hindu, who ceased to be a Hindu by conversion to non-Hindu religion can become a Hindu again by reconverting into any one of the four religions of Hindus viz. Hinduism, Jainism, Buddhism or Sikhism. By Conversion, a person (Convert or reconvert) renounces his faith and adopts another.

The Dharmashastra did not prescribe any ceremonies for conversion to Hinduism. Among the Hindus, only Arya Samajists prescribed a ceremony known as 'sudhi'. A person who undergoes 'sudhi' ceremony gets converted to Hinduism and he is called 'Arya Samajist Hindu'.

3. Hindu by Birth: Any person born of Hindu parents is a Hindu by birth. According to modern Hindu Law, a person is a Hindu by birth in the following two cases:

i) When both the parents are Hindus. Any child, legitimate or illegitimate, born of Hindu parents, who are Hindus. It is necessary that both the parents should be Hindus, Sikhs, Jains or Buddhists. If one parent is a Hindu and the other is Jain, Sikh or Buddhist, then also the child will be a Hindu.

In *Maneka Gandhi* v. *Indira Gadhi* (AIR 1985 Del 114) – it was held that Sanjay Gandhi, son of a parsi father and a Hindu mother was a Hindu at the time of his death as he was brought up as a member of his mother's (Indira Gandhi's) community.

ii) When one parent is Hindu: Any child, legitimate or illegitimate, one of whose parents at the time of birth was a Hindu and was brought up as a Hindu (eventhough the Hindu parent converts to another religion subsequently). In other words, a person is said to be a Hindu, if the

following conditions are satisfied–

At the time of his birth one of the parents was Hindu, and he is brought up as a member of the tribe community, group or family to which Hindu parent belonged at the time of the birth of the child. This was the position, even before the codified Hindu law.

Under the modern Hindu law, the child's religion is not necessarily that of the father. If the mother of a child at the time of the child's birth was a Hindu and the child was brought up as a Hindu, the child would be a Hindu. In the codified Hindu law it is made evident by the use of the word 'belonged' in explanation (b) of Section 2(1), Hindu Marriage Act, 1955. For instance, a child is born of a Hindu mother and a Muslim father. The child is brought up as a Hindu. Subsequently the mother converts to Islam. If at this point of time the question arises whether the child is a Hindu, we find that neither of the parents is a Hindu but nonetheless the child is a Hindu. The same will be the position if the child is brought up as a Hindu after the death of the Hindu parents.

Hindu under codified Hindu Law: The codified Hindu laws (viz. the Hindu Marriage Act,1955; the Hindu Succession Act 1956, the Hindu Minority and Guardianship Act, 1956 etc.) are applicable to two categories of persons as detailed below:

1. Those who are Hindus, Sikhs, Jains or Buddhists by religion or birth, and
2. Those who are not Muslims, Christians, Paris or Jews by religion.

A person who is a Sikh, Jain or Buddhist is not a Hindu by religion, though Hindu law applies to him. Similarly, a person who is not a Muslim, Christian, Parsi or Jew is not a Hindu by religion though Hindu law applies to him. Parliament in sub-section (1) of Section 2 of the Hindu Marriage Act, 1955 categories to whom Hindu law applies, and sub-section (3) of that section calls them Hindus.

This, virtually means that a uniform family law applies to all persons within the territories of India (excluding Jammu and Kashmir) who are not Muslims, Christians, Parsis and Jews. Thus what Parliament meant to enact is amply clear from other provisions of the codified law. The modern Hindu law does not apply exclusively to Hindus and it does not apply to all Hindus either. (The Codified Hindu law does not apply even to those Scheduled Tribes who are Hindus). The modern Hindu law is a body of rules of personal law applicable to Hindus as well as several non-Hindu communities. In the modern Hindu law, all those persons to whom Hindu law applies are called 'Hindus' (Gogireddy v. Gogireddy, 1972 AP 156).

2. SOURCES OF HINDU LAW

Source means "basis from which law is evolved". Source of Law' is a basis, which enables the courts to interpret law".

Keeton defines 'source' as "the material out of which law is eventually fashioned through the activity of judges". Hindu law is about 6000 years old and the study of the sources of Hindu Law is the study of its various phases of development to meet the changing needs. Hindus considered vedas as the material source of all knowledge. Hindu law is not only divine, but also sacrosanct, inviolable and unchangeable. It cannot be questioned, challenged or violated.

The sources of Hindu Law may be classified under the following heads:

1. Ancient or Traditional Sources

i) Sruti (Vedas);

ii) Smritis;

iii) Digests and Commentaries; and

iv) Custom.

2. Modern Sources

i) Equity, justice and good conscience;

ii) Precedent; and

iii) Legislation.

1. Ancient/Traditional Sources: The ancient Hindu legal system recognised the following four sources:

i) Sruti (Vedas): The primary and important source of Hindu Law is Sruti or Vedas. The four Vedas are the foundation-head of Hindu religion and law. The word 'Sruti' literally means "what was heard". In other words, "what is heard by Rishis (sages) from God is Sruti or Veda". 'Veda' means knowledge or to know. There are four vedas namely the Rig, the Yajur, the Sama and the Atharvana. Vedas contain the voice of God. These Vedas contain the sacred lore and esoteric knowledge of the Hindus and came into existence long before 4000-1000 B.C.

ii) Smritis: Next to vedas, Smritis are the most important source of Hindu Law. The word 'Smriti' literally means "what has been remembered". Sruti (Vedas) represent direct words of God as heard by the sages, while Smritis represent what was remembered from the words of God heard by sages. The early smritis were termed as Dharma Sutras (800-200 B.C.). They were mostly in prose form and were written by the teachers expounding Vedas for the sake of their students. Gautama, Boudhayana, Apasthamba, Vasishta, Vishnu and Harita are the main Dharma Sutra Karas. The later Smritis were termed as Dharma Sashtras which are more systematic expositions than Dharma Sutras. The subject matter in these smritis is divided into Achara Vyavahara and Prayaschitta. The principles of law are mostly covered under the part, Vyavahara. Manu, Narada and Yagnavalkya are the important smritikars. Manusmriti is the oldest smruthi and is of great importance and is considered as a 'reservoir of law'. (It has 12 chapters containing 2,694 slokas). The Code of Manu in its present form of 2694 Slokas dates from 200 B.C. according to Max Muller. The Code deals with many matters, but the part bearing upon law deals with the subject under 18 titles; debts, pledges, sales, deposits, partnership, gifts, wages, agreements, boundary, disputes, master and servant, husband and wife, partition and inheritance, betting and gambling, assault, defamation, theft, robbery

and adultery.

iii) Digests and Commentaries: The Digests and Commentaries cover a period of about 1000 years from 700 A.D. to 1700 A.D. Notable smritis and digests are namely, Manubhashya written by Medhatithi (895-900 A.D.), Manavata Muktavali written by Kulluka Bhatta (1250 A.D.), Mitakshara, a famous commentary written; by Vignaneswara (1100 A.D.)l, Aparaditya written by Aparaka (1200 A.D.) etc. In addition, there are certain regional digests and commentaries like Smriti Chandrika written by Devammabhatta in South India (120 A.D.), Viramitrodaya written by Mitramisra (17th Century) in Western India, Vivadachintamani written by Vachaspathi (15th Century) in Mithila, the above Viramitrodaya in Banaras, and yet another famous work Dayabhaga written by Jimutavahana (12th Century). The rules enshrined in Smritis were not clear and were not free from conflicts. For facilitating the administration of justice, necessity arose to analyse and systematise the smritis, by the commentators and digest writers. The important commentaries are namely, Manutika, Manubhashya, Mitakshara, Dayabhaga etc.

iv) Custom: Manu recognised custom to be transcedant law, 'Custom' means "Achara or usage", a traditionally followed long practice, by the members of a society. Hindu philosophy enunciates that 'Achara Paramodharmaha'. It is a good source to interpret law in the administration of justice. *The Privy Council in Collector of Madhura vs. Mootoo Ramalinga Sethupathy* (1868) 12 M.L.A. 397, also has recognised 'Custom' as the supreme authority in Hindu Law. The question arose in the instant case was, whether in the Dravida country (South India) a widow could make an adoption even in the absence of express authority from her husband. Examples of such customary practices were given to show that with the authority of deceased husband's Sapindas a valid adoption could be made by the widow. The relevant text of the Sage Vasishta was to the effect that a woman should not adopt except with her husband's permission. The Privy Council pointed out that it was not open to the judges to embark upon an independent enquiry into the meaning of the Dharma Sastra text. The text is to be understood only in the light of the actual

practice. Sir James Colville observed in this case: "Under the Hindu System of law clear proof of usage will outweigh the written text of the law". Custom is a bonafide practice being observed by the people in general from generations to generations and the starting point of which is unknown. A custom to be valid, it must be a) ancient; b) continuous; c) reasonable; d) moral; and e) not contrary to the statutory law in force.

There are different customs as detailed below:

i) Local Custom.

ii) Family Custom, and

iii) Caste or Community Custom.

i) Local Custom: A local custom is a custom which prevails in a locality, in a geographical area, not necessarily confined to an administrative division or district, and is binding on all persons in the area within which it prevails. It is different from a caste custom or family custom. The Privy Council observed in *Mst. Subbane v. Nawab* (1947 Lah 154) – It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law.

ii) Family custom: Family custom is binding only on the members of the family. As early as 1868, the Privy Council said that custom binding only on members of family has been long recognized as Hindu law (*Soorendranath v. Heeramonee*, 12 MIA 91). A family custom different from the law or custom of the locality in which the family is living can be proved and is enforceable. A family custom can be more easily abandoned than a local custom. Impartible estate and succession by the rule of primogeniture are two important examples of family custom.

iii) Caste or community custom: By far the largest area of custom in personal law of the Hindus is covered by caste or community custom. A caste or community custom is binding on all the members of the caste or community wherever they may be. Most of the Punjab customary law is of this nature. The custom among the Jats that

one can marry one's brother's widow or the custom which permits marriage with sister's daughter in South India or the custom permitting adoption of daughter's son or sister's son is of this type.

2. Modern Sources: The modern sources of Hindu Law may be explained as follows.

i) Equity, Justice and Good Conscience: Equity, Justice and Good Conscience is the principle of English law, which owes its origin to the beginning of the British administration of justice in India. The ancient Hindu law had its own version of the doctrine of equity, justice and good conscience. According to Gautama, "In cases for which no rule is given, that course must be followed of which at least ten (persons) who are well instructed, skilled in reasoning and free from covetousness approve." According to Brihaspati, "No decision should be made merely exclusively according to the letter of the Shastra for in a decision devoid of Yukti (reason or equity), failure of justice occurs." Yajnavalkya said that when on a matter there were conflicting rules of law, the matter should be decided on the basis of Nyaya (natural equity and justice). The charters of several High Courts established by the British Government directed that, when the law was silent on a particular point, the case was to be decided in accordance with the principles of Justice, Equity and Good conscience. Later, the Supreme Court of India applied the principles of 'Justice, Equity and Good Conscience' in the absence of any rule of Hindu Law.

ii) Precedent: According to Oxford Dictionary, "Precedent" means a previous instance or case, which is or may be taken as an example of rule for subsequent cases. In other words, if a previous decision by a court is taken as a basis/source for deciding a subsequent case under similar facts and circumstances, it is called `Judicial Precedent'. According to Bentham, Precedents are Judge made laws.

Precedent is called to be a source of Hindu law in two senses: First, practically all the important principles and rules of Hindu law have now been embodied in case law. In such matters, recourse to original sources is not necessary. Reference to leading decision

is enough. Secondly, precedent is a source of law in the sense that by the process of judicial interpretation, doctrines, principles and rules of law stand modified or altogether new principles, doctrines and rules have been introduced in the body of Hindu law. For these principles, doctrines and rules, the source of authority is precedent.

While interpreting the provisions of Hindu Law, sometimes the courts lay down new principles of law. Such new principles are considered to be the sources of Hindu Law. The Privy Council during the British period and High Courts and Supreme Court in the modern period have laid down several new principles by way of interpretation. *Ex.:* The principles relating to women's estate, the doctrine of relation back and several principles relating to joint family.

Thus, in the administration of justice, precedent has great importance. The law declared by the Supreme Court is binding upon all other courts including High Courts. Similarly, the decisions of the High Court are binding on all the subordinate courts.

iii) Legislation: The term "Legislation" is derived from the Latin word 'Legislatum', which means "law making power". According to Salmond, legislation is that source of law, which consists in the declaration of legal rules by a competent authority". The law making body is called "the legislative body or legislative authority or legislature".

During British period, many changes were made/incorporated in the Hindu Law through certain legislations. The legislative changes/ modifications till August 15, 1947, are not insignificant. Some of the statutes which have effected modification in Hindu law, either by reforming Hindu law or by superseding rules of Hindus, may be noted here. The earliest statute was passed in 1850, the Caste Disabilities Removal Act. It was followed by Hindu Widows Remarriage Act, 1856, Hindu Wills Act, 1870, Hindu Transfer of Bequest Act, 1914, Child Marriage Restraint Act, 1929, Hindu Gains of Learning Act, 1930, Hindu Inheritance (Removal of Disabilities) Act, 1928, Hindu Law of Inheritance (Amendment) Act, 1929, Hindu Women's Right to Property Act, 1937, Arya Marriage Validation Act, 1937, Hindu Women's Right to Separate Maintenance and Residence Act, 1946,

Hindu Marriage (Removal of Disabilities) Act, 1946, Hindu Marriage Validity Act, 1949.

Codification of Hindu Law: Earlier, marriage, divorce etc. were governed by traditional principles. In old law, there were many defects/evil practices viz. child marriages, prohibition of intercaste marriages, opposition/prohibition of widow marriages etc. Even after the passing of many legislations during the pre-independence and post independence period viz. Child Marriage Restraint Act, 1929; Caste Disabilities Removal Act, 1850; Hindu Widows Remarriage Act, 1856 and Hindu Marriage Validity Act, 1949, the evil practices under the old law could not be eradicated. These legislations were piecemeal and were not free from certain defects. Finally, in 1941, a committee was constituted to codify the Hindu Law. The committee submitted its report together with a draft code in 1946. But the draft code was opposed by an orthodox section of Hindus. It was again introduced in the Parliament, but was lapsed with the dissolution of the house. Finally the Government decided to split up the Hindu Code Bill and pass it in instalments. As a result, four enactments namely, the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Adoptions and Maintenance Act, 1956 and the Hindu Minority and Guardianship Act, 1956 were passed (The Hindu Succession Act, 1956, which deals with intestate succession, has been prescribed for study in Family Law-II and the remaining three Acts are studied in the present subject Family Law-I).

3. SCHOOLS OF HINDU LAW

The Schools of Hindu Law emerged from the Commentaries and digests. There are two main schools, namely:

1. Mitakshara School; and
2. Dayabhaga School.

Vijnaneswara's commentary on Yajnavalkya Smriti is called Mitakshara, which means 'measured in words'. Dayabhaga School got its name from a leading smritis by name Dayabhaga, written by Jimoothavahana. Mitakshara School prevails all over India except

the State of Bengal and Assam, while Dayabhaga prevails in Bengal and Assam. Mitakshara deals with all titles of law, while Dayabhaga deals with partition and inheritance.

Sub-Schools of Mitakshara: Mitakshara school may be subdivided into the following four schools:

1. Dravida or Madras School;
2. Maharashtra or Bombay School;
3. Benaras School; and
4. Mithila School.

Distinction between Mitakshara and Dayabhaga Schools:

Mitakshara	Dayabhaga
1. Joint Family	
A son, grand son and great grand son acquire right by birth in ancestral property.	There is no such right by birth, Ownership of son arises only on death of father.
2. Survivorship	
Brothers, who inherit property from their father, have the right of survivorship.	Dayabhaga does not recognise such survivorship.
3. Widow's rights	
When one of the brothers dies, the widow can succeed to the share	Widow cannot succeed, but is entitled to maintenance.
4. Sapinda : Heirship	
The relationship of Sapinda arises according to community of blood.	The heirship arises by means of pinda offerings (spiritual benefit).

QUESTIONS AND HOW TO ANSWER

The present subject Family Law-I is one of the 9 subjects prescribed for study in the first year LL.B. (3 year course) and third year LL.B. (5 year course) by all the Universities of Andhra Pradesh. The question paper comprises of 3 parts. Part-A contains short questions. Part-B contains essay questions and Part-C contains the questions as Case Comment i.e. in form of problems or cases. For details, the model/old question papers of the different Universities are given at the end of this book.

1. Who is a Hindu?

   (This question may be asked as a short question in Part-A or an essay question in Part-B).

Ans. Write the meaning of Hindu in brief i.e. in a paragraph/ one page if asked as a short question and in detail covering Hindu by religion, Hindu by conversion etc. if asked as an essay question. (Similarly, any question shall be answered in brief if asked as a short question and in detail if asked as an essay question).

2. What are the sources of Hindu Law?

Ans. Write the meaning of the term 'source' and then write the ancient and modern sources of Hindu Law.

3. Distinguish between Mitakshara School and Dayabhaga School?

Ans. Write about Mitakshara School and Dayabhaga School first, and then write the differences between the two schools.

Part - I

The Hindu Marriage Act, 1955

Lecture - II: Marriage

This lecture covers the following heads:

1. Marriage: Meaning and Definition.
2. Objects of the Marriage:
   - i) Dharma Sampatti.
   - ii) Praja Sampatti, and
   - iii) Rati Sukham.
3. Forms or Kinds of Marriage:
   - A) Regular or Approved or Civilized Forms of Marriages:
     - i) Braha.
     - ii) Daiva.
     - iii) Arsha.
     - iv) Prajapatya.
   - B) Irregular or Unapproved or Uncivilized Forms of Marriages:
     - i) Asura.
     - ii) Gandharva.
     - iii) Rakshasa, and
     - iv) Paisachika.
4. Conditions of Marriage:
   - A) Conditions under Ancient Texts (Old Law-Uncodified Law):
     - i) Identity of Castes.
     - ii) Monogamy.
     - iii) Sapinda Relationship.

iv) Prohibited Degrees of Relationship.

v) Prohibition of Sagotra and Sapravara, and

vi) Marriage Ceremonies.

B) Conditions under the Hindu Marriage Act, 1955 (Codified Law):

i) Monogamy.

ii) Mental capacity.

iii) Age of Parties to Marriage (Age Limit).

iv) Degrees of Prohibited Relationship.

v) Sapinda Relationship.

C) Additional Conditions under the Act:

i) Marriage Ceremonies.

ii) Registration of Marriage.

iii) Free Consent.

5. The Doctrine of Factum Valet.

6. Nature of Hindu Marriage: Whether Hindu Marriage is a Sacrament or a Contract or both?

7. The salient Features of the Hindu Marriage Act 1955.

8. Amendments, and

9. Changes brought about by the Amendment Act of 1976.

1. MARRIAGE: MEANING AND DEFINITION

Marriage: Meaning: Marriage is the 'nucleus' of the family. It is a process, by which the physical union of a man and woman is legalised and thereby regulates social life. According to Tomlin's Law Dictionary – "marriage is a civil and religious contract, whereby a man is joined and united to a woman, for the purposes of civilized society. In other words, the very foundation of the family and society is the marriage. Hindus consider marriage as a necessary samskar and sacramental union - a sacrosanct, permanent, indissoluble and

eternal union. A man or woman without spouse (a lawfully wedded wife or husband) enjoys no social status and is also looked down in the society. In simple words, **a spouseless person is a "leafless tree".**

Marriage: Definition:

i) According to Earnest R.Groves, "marriage is public confession and legal registration of an adventure in fellowship".

ii) In the words of Lundberg "marriage consists of the rules and regulations which define the rights, duties and privileges of husband and wife, with respect to each other".

iii) According to Harry M. Johnson "marriage is a stable relationship in which a man and a woman are socially permitted, without loss of standing in the community to have children".

iv) In the words of Collins Dictionary of Sociology "marriage is a socially acknowledged and sometimes legally ratified union between an adult male and adult female".

v) Malinowski defines "marriage is a contract for the production and maintenance of children".

vi) According to Raghumnandan, a well known Bhasyakar, "the acceptane of bride as his wife by the bridegroom in a gift by her parents is defined as marriage".

vii) According to Vedas, a marriage is, "the union of flesh with flesh and bone with bone". It is the union which Vedas regard indissoluble. So long as the husband is alive the wife is enjoined to regard him as her God, similarly the wife is declared to be half the body of her husband (Ardhangini) who shares with him equally the fruits of all his acts whether they be good or bad.

2. OBJECT OF MARRIAGE

According to Mitakshara Law, marriage has three objects namely:

i) Dharma Sampatti;

ii) Praja Sampatti; and

iii) Rati Shukham.

i) Dharma Sampatti: The main object of the marriage is 'Dharma'. As per Vedas, the highest act of dharma lies in the performance of Yagnas and Sacrifices. Shastras do not allow a wife-less man to perform Yagnas or sacrifice or anniversaries of the ancestors. There must be a wife for honouring the guests, which is an act of Dharma. In those days, honouring the guests was regarded as Godliness (of course, it may be treated as a Ghostliness today). The sacrifice of the only son by Bhakta Siriyala in honouring the guests is the best example.

ii) Praja Sampatti: Marriage is one of the essential samskaras to have a son. The son by performing the religious ceremonies fulfils the object of Praja Sampatti. He can avoid the torturing of the soul of the parted ancestor i.e. father/grand father/great grand father, in the hell called 'put', by performing the obsequies. (Obsequies = funeral rites and solemnities). Therefore, the son is called 'Putra', a means of salvation.

iii) Rati Sukham: The third object is 'Rati Sukham' the pleasure of sexual enjoyment. It is a biological necessity.

3. FORMS (KINDS) OF MARRIAGE

Manu classified marriages as follows:

A) Regular/Approved Forms:

i) Bhahmak.

ii) Daiva.

iii) Arsha, and

iv) Prajapatya.

B) Irregular/Unapproved Forms:

i) Asura.

ii) Gandharva.

iii) Rakshasa, and

iv) Paisachika.

A) Regular or approved/civilised forms of marriage:

i) Brahma: In this form, bride's father invites the bridegroom and makes gift of his daughter. In this form gift of a daughter, clothed only with a single robe, to man learned in the Vedas and of good conduct when her father voluntarily invites, and respectfully receives, is the nuptial rite called Brahma. The chief feature of this form is that the parents do not receive any consideration for giving the girl in marriage, their choice of the bridegroom not being determined by a desire to trade on their daughter. This form was originally prevalent among the Brahmins. The Brahma form of marriage has been considered to be the best form. It is the only form of marriage which is not supposed to be prevalent. Even the Sudras may marry now in this form. Even a widow could be given in this form of marriage.

ii) Daiva: In this form, bride decked with ornaments is given in gift to a priest, who duly officiates at a sacrifice performed by the father in lieu of Dakshina or fee due to the priest.

iii) Arsha: In this form, bride's father accepts one or two pairs of cows from bridegroom in exchange of bride. In the Arsha form, the nominal character of the sale was clear; for the father's taking from the bridegroom a cow and a bull or two pairs was only in fulfillment of the sacred law, there being no intention to sell the child; and the bull and the cow were received back with the bride by the bridegroom.

iv) Prajapatya: In this form, the father addresses the bridal couple 'May both of you perform together your duties' and gives in gift to the bridegroom not invitee, but a suitor. Prajapatya is ancient form of Hindu marriage and is similar to the Brahma form of marriage.

The above four forms are said to be civilized in the sense that they are approved by the sages.

B) Irregular or Unapproved or uncivilised forms of Marriages:

i) Asura: In this form, Bridegroom receives bride by paying money. According to Manu, when the bridegroom receives a maiden,

after having given as much wealth as he can afford, to the Kinsmen and to the bridge herself, according to his own will, that is called the Asura rite. According to Asvalayana, a wedding is called Asura where a man marries her after gladdening her father by money. This form of marriage is almost a marriage by sale because it amounts to a sale of daughter by the father. The Asura form is largely practied in South India and according to Sir Thomas Strange, it is questionable whether in South India, any other form but the Asura is now observed. In *Venkata Krishnaya v. Lakshminarayana* [ILR 32 Mad 185] it was held that the validity of a marriage in Asura form in the present days has been upheld by judicial decisions and there can be no question of its being unrecognized today on the score of public policy, but an arrangement to pay any consideration to the father or brother of the bride in consideration of the marriage cannot be specifically enforced nor can a suit for its refund after marriage be entertained. However, in *Gulabchant v. Fulbai* [ILR 33 Bom. 411] it was held that if the marriage fails through the price paid may be recovered.

ii) Gandharva: It is a love marriage i.e. voluntary union of maiden and her lover. According to Asvalayana, where a man marries her after a mutual agreement has been made between the lover and the damsel, it is called the Gandharva. Baudhayana says that the Gandharva is lawful for Vaisyas and Sudras. In *Brindavana v. Radhamani* [12 M 72] the Madras High Court held that Gandharva marriages are legal if celebrated with nuptial rites having as their essential part in ceremony of homum.

iii) Rakshasa: It is a forcible marriage against the will. According to Manu, the forcible abduction of a maiden from her home, while she cries out and weeps, after her kinsmen have been slain or wounded and their houses broken open, is called the Rakshasa rite. Rakshasa marriage was by forcible capture and allowed only to Kshatriyas or military classes. The Rakshasa form of marriage in which the maiden is seized from her house by force is still practised among certain classes of Gonds of Berar and Betual of Madhya Pradesh and among the rude hill tribes.

iv) Paisachika: In this form, a man seduces a girl in sleeping or unconscious state. According to Baudhayana, 'if one has intercourse

with a maiden who is sleeping intoxicated or out of her senses (with fear or passion) and weds her afterwards, that is the rite of Paishacha.

These four forms are said to be uncivilised in the sense that they are not approved by the sages, of these, only three remained in practice viz.

i) The Brahma.

ii) The Asura, and

iii) The Gandharva forms of marriage.

However, according to Section 7 of the Hindu Marriage Act, 1955, the different kinds of marriages have been ceased to exist. The parties can adopt any one form (of marriage) prevailing in his/her community.

4. CONDITIONS OF MARRIAGE

The conditions of marriage may be explained with reference to:

A) Conditions under Ancient Texts (Old Law); and

B) Conditions under the Hindu Marriage Act (Codified law).

A) Conditions of Marriage under Ancient Texts: According to the Ancient Texts, a marriage to be valid, the following conditions are to be satisfied.

i) Identification of Castes.

ii) Monogamy.

iii) Sapinda Relationship.

iv) Prohibited degrees of relationship.

v) Prohibition of Sagotra and Sapravara, and

vi) Marriage Ceremonies.

i) Identity of Castes: The parties to the marriage (boy and girl) should belong to the same caste. In those days, inter-caste marriages were prohibited. If the male belongs to lower caste and

the female belongs to higher caste, it is called 'Pratiloma' marriage and is prohibited. If the male belongs to higher caste and the female belongs to lower caste, it is called 'Anuloma' marriage and was permissible.

ii) Monogamy: He/she should not have spouse living at the time of marriage. She should not have been married to another earlier. In those days (prior to Widow Marriages Act) widow marriages were not allowed.

iii) Sapinda Relationship: The bride should not be a sapinda of the bridegroom.

iv) Prohibited Degrees of Relationship: The parties to the marriage should not be within the degrees of prohibited relationship. Prohibited relationship in the sense, marriage between certain relations is prohibited and such marriage is void. For Example; Marriage between Father and Daughter, Mother and Son, Father-in-Law and Daughter-in-Law, Mother-in-Law and Son-in-Law, between Brother and Sister, between Uncle and Niece, and between the children of two brothers and two sisters etc. A man should not marry a widow, who was his brother's wife or Uncle's (paternal or maternal) wife etc.

However, a marriage between certain relations is permissible if their custom permits such marriage and the same is permitted by the Hindu Marriage Act, 1955. Eg.:— Marriage between uncle and niece. Similarly between Brother's daughter and sister's son.

v) Prohibition of Sagotra and Sapravara: If the parties to the marriage belong to the same gotra, they are called 'Sagotras or Sapravaras'. The marriage between the Sagotras is prohibited and void. This rule does not apply to Sudras. However, the sagotra marriages were validated by the Hindu Marriage Disabilities Removal Act, 1946. This rule had been incorporated under Section 29(1) of the Hindu Marriage Act, 1955.

v) Marriage Ceremonies: A marriage to be valid, it is necessary to perform certain ceremonies, shastraic or customary. They are i) The performance of homa, the panigrahana (invocation of sacred

fire); and ii) Saptapadi. The marriage ceremony is said to be complete, when the seventh step is taken by the bride and bridegroom together around the holy fire.

B) Conditions of Marriage under the Hindu Marriage Act, 1955: Section 5 of the Hindu Marriage Act, 1955, lays down the conditions of a valid marriage as follows:

i) Monogamy: Neither party has a spouse living at the time of marriage.

ii) Mental Capacity: At the time of the marriage, neither party:

a) is incapable of giving a valid consent, to it in consequence of unsoundness of mind; or

b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

c) has been subject to recurrent attacks of insanity or epilepsy.

iii) Age of Parties (Age Limit): The bridegroom has to complete the age of 21 years and the bride has to complete the age of 18 years at the time of the marriage.

iv) Degrees of Prohibited Relationship: The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two.

v) Sapinda Relationship: The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

C) Additional Conditions: In addition to the above, the Act provided for some other conditions as detailed below:

i) Requirement of Marriage Ceremonies.

ii) Requirement for Registration of Marriage, and

iii) Free consent of both the parties to the marriage.

The above points are discussed in detail as follows:

i) Monogamy: Monogamy means having one spouse. Spouse means a lawfully wedded wife or husband. (Bigamy means having two spouses; polygamy means having more than one wife; and polyandry means having more than one husband). A Hindu cannot have more than one spouse living. So, a person, who wants to get married should not have spouse living at the time of the marriage. He/She should be an unmarried or a widower/widow or divorced. (Sec.5(i).

Effects/Consequences: If the person having a spouse (living at the time of marriage and not divorced) marries again, he/she is guilty of Bigamy under Section 17 of the Hindu Marriage Act, 1955. Such marriage is declared void under Section 11 of the Hindu Marriage Act. The person, guilty of the offence of Bigamy is liable for punishment under Sections 494 and 495 I.P.C.

ii) Mental Capacity: The parties to the marriage must be competent to contract the marriage. Neither of the parties must have been suffering from unsoundness of mind or mental disorder or insanity. The parties must be capable of giving valid consent. Otherwise, he/she is unfit for procreation of children (Sec.5(ii).

Clause (ii) of Section 5 of the Act lays down as one of the conditions for a Hindu Marriage that neither party must be suffering from unsoundness of mind, mental disorder, insanity and Section 12(i)(b) of the Act renders at the instance of a party, the marriage voidable, if the other party was suffering from any such infliction at the time of the marriage.

According to Section 5(ii) of the Act, 'free consent' is a necessary element of a Hindu Marriage. Under Section 5(ii) a persistent unsoundness of mind is not required. It is sufficient if the party is incapable of giving valid consent to the marriage because of his/her unsoundness of mind.

Under Section 5(ii)(b) of the Act, every mental disorder will not give rise to remedy under Section 12 of the Act but only that

mental disorder which renders the party unfit for the marriage and for procreation of the children.

'Epilepsy' was also considered for invalidity of marriage. However, the words 'or epilepsy' from Section 5(ii)(c) of the Act have been omitted by Act No.39 of 1999 with effect from 29-12-1999.

In *Ram Narain Gupta v. Rameshwari Gupta* [1(1988) 4 SCC 247], it was held that the onus of proof about lunacy or idiocy lies on him who makes a petition to annul the marriage. The presumption is in favour of validity of marriage and in favour of mental capacity of the spouse entering into matrimony. In *R.Lakshmi Narayan v. Santhi* [(2001) 4 SCC 688] it was held that a marriage which takes place in contravention of this condition is not per se void but voidable under Section 12(1)(b) of the Hindu Marriage Act, 1955.

Effects: The marriage in violation of the above condition/rule can be annulled on the ground of mental incapacity under Section 12(i)(b).

iii) Age of Parties to Marriage (Age Limit): The bride must have completed the age of 18 years and the bridegroom must have completed the age of 21 years to get married (Sec.5(iii).

(Prior to the Act, Child marriages were prevalent/common among girls, and widow marriages were not allowed. In 1929, Child Marriage Restraint Act was passed. This Act prescribed the age limit of 14 years for a girl and 18 years for a boy for the marriage. Subsequently, the age limit for girls was raised to 15 years).

Effects: A marriage solemnized contrary to the above provision is neither void nor voidable. The bride can exercise the option of puberty under Section 13(2) of the Act, for decree of divorce. The persons concerned are liable for simple imprisonment, which may extend to fifteen days or with fine, which may extend to one thousand rupees or with both under Section 18(a) of the Hindu Marriage Act, 1955.

Appala Suramma vs. Ganapatulu AIR 1975 43(FB): A.P. High Court held in this case that, a child marriage in contravention to Sec.5(iii)

of Hindu-Marriage Act is void. However, the Full Bench through Divan C.J. overruled the above decision.

In *Rabindra Prasad vs. Sita Devi,* AIR 1986 Pat. 128 — It was held that a marriage in contravention of Sec.5(iii) Hindu Marriage Act is not void.

Many High Courts held that a child marriage (i.e. in contravention of Section 5(iii) of the Act) is unaffected by pointing out that the Hindu Marriage Act itself is silent on the question whether such a marriage is void or not. It, no doubt, prescribed a punishment under Section 18 (a) for contravention of clause (iii). From this no conclusion can be drawn as to the legal validity of the marriage itself.

The leading case on the subject of the age of parties is *Pendenti Venkata Ramana v. State of Andhra Pradesh* [1977 AP 43]. The facts of the case are: The marriage of A and B was solemnized by their elders in 1959 when they were respectively 13 and 9 years of age. In 1975, the husband A married another woman treating his previous marriage with B as void. B the first wife filed criminal petition against A under Section 494 of IPC for the offence of bigamy. A cited the case *'Saramma v. Ganapatulu* [AIR 1975 AP 193) in which the High Court of Andhra Pradesh decided that a child marriage is void, and is in contravention of Section 5(iii) of Hindu Marriage Act, 1955 and contended that his first marriage was void according to the provisions of the Restraint of Child Marriages Act, 1929 and was against the provisions of Section 5 of the Hindu Marriage Act 1955.

The High Court of Andhra Pradesh overruled the decision of *Saramma v. Ganapatulu* case and held that the marriage was valid.

In *Rabindra Prasad v. Sita Devi* [AIR 1986 Part 128] the court held that a child marriage (i.e. the marriage in contravention of Section 5(iii) is not void and observed that 'the marriage solemnized in violation of Section 5(iii) remains unaffected. It is neither void nor voidable and the appellant, therefore, cannot obtain disengagement on this score.

The Supreme Court also observed in *Lila Gupta v. Lakshminarayana* [1978 SC 1351 at 1358] that a reference to Child

Marriage Restraint Act would show that it was enacted to carry forward the reform movement of prohibiting child marriages and while it made a marriage in contravention of the provisions of that Act punishable, it did not render the marriage void. The same reasoning would apply to marriage contravening Section 5(iii) of the Act.

After the decision of the Supreme Court, the Rajasthan and Punjab High Courts have held that a wife is not entitled to any declaration that her marriage was void or voidable by reason of the contravention of Section 5(iii) as the legislature exempted that provision from the purview of Sections 11 and 12 of the Act.

However, the bride or bridegroom has an option to cancel the marriage after obtaining their majority like in the Muslim marriages where a bride or bridegroom can revoke their child marriage after attaining his/her puberty, if he/she does not like it. If he does not revoke the marriage, the tie continues. Section 12 of the Child Marriage Restraint Act also explains the same thing i.e. the Civil Court can issue injunction against the performance of the child marriage, after giving due opportunity to the concerned parties.

iv) Degrees of Prohibited Relationship: The parties to the marriage should not be within the degrees of prohibited relationship unless the custom permits. Clause 10 of Section 5 of the Hindu Marriage Act, 1955 lays down that no marriage is valid if it is made between persons related to each other within the prohibited degrees unless such marriage is sanctioned by custom or usage governing both the parties.

A marriage falling within the prohibited degrees of relationship would be void under Section 11 of the Act. Moreover Section 18(b) punishes the erring party with the simple imprisonment which may extend up to one month or with fine with may extend to one thousand rupees or with both.

Clause (iv) of Section 5 of the Act provides that if there is a custom or usage governing the contracting parties which sanctions such a marriage it would validate the marriage and the voidability of the same prescribed by Section 11 of the Act will not come into play.

Dr.Mahmood [in his Hindu Law (1981) pp 54, 55] summarized the degrees of prohibited relationship as given below:

For Men	For Women
1. Mother.	1. Father.
2. Grand-mother howsoever high.	2. Grand-mother howsoever high.
3. Former wife of father or grand-father how soever high.	3. Former husband of mother or grand-mother howsoever high.
4. Former wife of son or grand-son, howsoever high.	4. Former husband of daughter or grand-daughter, howsoever high.
5. Former wife of brother.	5. Brother of former husband.
6. Former wife of either parent's brother.	6. Nephew of former husband.
7. Former wife of grand-parent's brother.	7. Grand-nephew of former husband.
8. Sister.	8. Brother.
9. Either parent's sister.	9. Either parent's brother.
10. Daughter of a brother or sister.	10. Sister of a brother or sister.
11. Daughter of either parent's brother.	11. Son of either parent's brother.
12. Daughter of either parent's sister.	12. Son of either parent's sister.

Following are the instances of prohibited relationships:

a) A lineal ascendant : father and daughter; son and mother.

b) Wife or husband of a lineal ascendant or descendant.

Eg.: Father-in-Law and Widowed Daughter-in-Law; Widowed Mother-in-Law and Son-in-Law.

c) A man cannot marry the widow, who was the wife of his brother, or uncle (maternal/paternal) or grand father's brother or grand mother's brother.

d) Brother and Sister, Uncle and Niece, Aunt and Nephew, Children of Brother and Sister or of two brothers and two sisters.

Custom Saved: However, a marriage between certain relations stated above is valid, if the custom permits the marriage between such relations.

Eg: In South India, marriages between the Children of Brother and Sister, and between a male and his sister's daughter are common and are valid by custom.

In *Smt. Shakuntala Devi v. Amar Nath* [AIR 1982 P&H 22] it was held that the conditions of a valid marriage under Section 5(iv) of the Act stand qualified by custom meaning thereby that in the event of custom being established, the marriage despite prohibited relationship between parties to it would constitute a legal and valid marriage but these customs may be proved to be very old and beyond human memory.

In *Venkata v. Suibhadra* [ILR Mad. 548] it was held that a custom permitting marriage with the maternal uncle's daughter is recognized.

In *Balaswami Reddiar v. Balakrishna Reddiar* [1957 Mad 97] where a custom was pleaded of marrying a daughter's daughter it was held illegal on the ground of immorality although it was a custom in Reddiar community of Tirunalveli District to that effect.

Jagannadh v. Sadhu Ram [AIR 1934 Lah. 283] in this case, it was held that, marriage with the widow of the predeceased son (widow daughter in law) is within the prohibited relationship, rejecting the plea of customary practice. The marriage was declared void on the ground of the nullity of marriage under Section 11 of the Hindu Marriage Act, 1955.

Effects: A marriage in contravention of the above provisions is void under Section 11 of the Hindu Marriage Act. Any person, who procures a marriage in contravention of the conditions specified in Clause(iii) of Sec.5 above shall be punishable with simple imprisonment, which may extend to one month, or with fine, which may extend to one thousand rupees or with both under Sec. 18(b) of the Hindu Marriage Act, 1955.

v) Sapinda Relationship: The parties to the marriage should not be sapindas of each other, unless the custom or usage permits. The rules relating to Sapinda relationship are enshrined in Sec.3(f) of the Act.

There are two theories relating to Sapinda relationship - namely:

A) Jimuthavahana's Theory or Oblation Theory; and

B) Vignaneswara's Theory or Particles of same body theory.

A) Jimuthavahana's Theory (Oblation Theory): Pinda offering (pindadan) to departed ancestors is a customary practice of Hindus. Pindadan extends to 7 generations i.e. self, three ascendants (Father, Grand Father and Great Grand father) and three descandants (Son, Grand son and Great Grand Son). When two persons offer pindas to the same ancestor, they are called 'sapindas'.

B) Vignaneswara's Theory (Particles of same body Theory): It was propounded by Vignaneswara. According to him, pinda is a particle of the same body. The parties to marriage should not have the same blood. According to this theory, father's particles of the body are present in son's body and hence, the father and son are the sapindas. The degree of sapinda relationship is seven through father and five through mother. Now, it is reduced to 5 and 3 respectively.

Effects: Any marriage solemnized in contravention to the above rule under Sec.5(v) of the Act is void according to Sec.11 of the Act. Any person, who procures such marriage shall be punishable with simple imprisonment, which may extend to one month or with fine, which may extend to one thousand rupees or with both.

As stated above, the following additional conditions are provided for validity of a Hindu Marriage:

i) Marriage Ceremonies.

ii) Registration of Marriage, and

iii) Free consent of Parties to the Marriage.

I) Marriage Ceremonies

There are three types of marriages namely, Sastric, Customary and Statutory. In all these systems, no marriage can be validly performed without certain formalities or marriage ceremonies. Marriage ceremonies bring/confer sanctity and solemnity to the institution of marriage. There are many ceremonies prescribed in a Hindu Marriage namely, Kanyadan, Saptapadi, Ganapati Puja, Nandi Devatas Puja, Graha Yagna, Snathaka Ceremony, Kasiyatra etc. etc. The law is uncertain as to which of these rites and ceremonies are essential/mandatary.

According to Section 7 of the Act, the marriage must have been solemnized in accordance with customary rites and ceremonies of atleast one of the parties to the marriage.

It is not necessary that the customary rites and ceremonies of both the parties should be followed.

In *Asraibai v. Dhondiram* [ILR 1977 Bom. 870] it was held that where a marriage is performed according to the customary rites and ceremonies of one party which did not include saptapadi, even though according to the customary rites and ceremonies of the other party saptapadi was an essential ceremony in valid marriage.

Section 7 runs as follows:

1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

The act did not prescribe any form of ceremonies and left to the choice of the parties concerned. Following two are the widely accepted sastraic ceremonies of the valid marriage.

i) Kanyadan;

ii) Homa or Vivah Homa and Saptapadi;

iii) Free consent.

i) Kanyadan: It is a gift of the bride given by her father to the bridegroom. While giving her away, the bride's father says, "My unmarried daughter, who is shining in her decorations and who is fit to be devoted wife, to thee of good character and wisdom I give for the attainment of dharma, Artha and Kama". It (Kanyadan) puts an end to the dominion of the genetive family over the girl.

ii) Homa or Vivah Homa: The most important ceremony for validity of a Hindu marriage is Homa or Vivah Homa, which consists oblations to lighting/burning of holy fire, symbolizing it as divine witness and sanctifier of the vivaha samskara. On the west of the fire is placed a millstone and on the north-east is placed a water-pot. The bridegroom offers oblations to the holy-fire in which the bride participates by grasping the hand of the bridegroom. These oblations include mahavayahritu-homa, i.e. oblations are offered in honour of earth, sky and heaven. The bridegroom also recites certain sacred mantras.

Saptapadi: The word 'Sapta' means "Seven" and "Padi" means "walking steps". "Saptapadi" means "walking/taking seven steps by the bridegroom and the bride jointly around the sacred fire pronouncing certain Mantras and pledging mutual fidelity with the Agni or sacred fire as witness. The bridegroom says: 'Become thou now my partner, as thou hast paced all the seven steps... Aye! Partners have we become as we have together paced all the seven steps... We shall live together and we shall reside together, we each shall be an object of love to the other, we each shall be a source of joy unto the other, with mutual goodwill shall we live together'.

Relevant Case Law

Deivain Achi vs. Chidambara Chettiar AIR 1954 Mad. 657 — In this case, marriage between a widow Reddy girl and a widower, Chidambaram Chettiar was solemnized under the auspices of an Anti Purohit Association, by exchanging the garlands and rings. They read a declaration to share joys and sorrows of each other. The customary rites and ceremonies (marriage ceremonies) of either spouse were not performed. A few years after the marriage, the wife filed a petition/ compliant against her husband for the offence of bigamy. The husband challenged the validity of the marriage on the ground that no ceremonies of marriage were performed. The Madras High Court held that a marriage solemnized without religious rites and ceremonies is not valid.

Ram Saran v. Mahabir Sewak [AIR 1934 PC 74] – In this case, there was a Katar Marriage (i.e. Marriage to a sword). The bridegroom who was Kshatriya sent his sword and the marriage was performed with the sword. It was held that such a marriage was not valid. Lord Thankerton rejected the claims of the issues of the marriage to succession to their father's Zamindari on the ground that they were illegitimate issue. This decision of the Privy Council emphasizes the need for strictly observing the religious ceremonies to create the marital tie.

The performance of necessary ceremonies is a vital question in case of a bigamy and failure to prove the performance of the marriage ceremonies renders the prosecution for bigamy a failure. Relevant case on this point is—

Dr. A.N., Mukerji vs. State AIR 1969 All 489 — In this case, the complainant got married to a physician, Dr. N.A. Mukerji. She alleged that she married him thrice. Firstly before moon, secondly in Kali Temple by exchanging garlands after taking seven steps and thirdly as an imitation of Sikh marriage before Guru Granth Sahib. Later, she lodged a complaint against her husband for the offence of bigamy. It was held that such mock ceremonies would not constitute a valid marriage.

Baburao v. State of Maharashtra [AIR 1965 SC 1564] – In this instant case, petition/complaint for bigamy under Section 494 I.P.C was filed on the ground that the second marriage was not valid for want of marriage ceremonies under Section 7 of the Hindu Marriage Act 1955.

The above view of the Supreme Court was followed in–

Pavan Kalyan v. Nandini (2008) in which the marriage between the petitioiner Nandini and a famous Telugu Film Hero Pavan Kalyan was declared not valid for proof of marriage ceremonies.

Priya Bala vs. Suresh AIR 1971, SC 1153 — The Supreme Court, in this case held that "Homa and Saptapadi are essential" and commission to perform these rites would not constitute a valid marriage under the Hindu Marriage Act.

But the Madras High Court in – *Indrani v. Vellathal* [1988 1 MLJ 168] held that exchange of garlands or putting a ring or tying a thali etc. are traditionally recognized stages of marriage ceremony among a majority of people who live in villages, hamlets etc. bringing into existence a binding marriage and are covered by Section 7(1) of the Hindu Marriage Act, 1955. Section 7(2) applies only where saptapadi is included among the rites and ceremonies as in the Brahminical form of marriage.

Customary Ceremonies: The parties can also observe the customary ceremonies which differ from caste to caste Eg. Thali.

Registration of Marriage: Section 8 of the Act empowers the State Government to make rules for registration of a marriage between two Hindus. Registration enables the parties to prove the marriage in the event of disputes.

Section 8 runs as follows–

1) For the purpose of facilitating the proof of Hindu marriage, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in Hindu Marriage Register kept for the purpose.

2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

3) All rules made under this Section shall be laid before the State Legislature, as soon as may be, after they are made.

4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts there from shall, on application, be given by the Registrar on payment to him of the prescribed fee.

5) Notwithstanding anything contained in this Section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

Present position in India with regard to the Registration of Marriage: Section 8 of the Hindu Marriage Act, 1955 envisages the registration of marriages and the registration is not mandatory. The State Governments are empowered to pass necessary legislations invoking the registration of marriages mandatory. However, owing to certain local and religious constraints most of the States have not yet passed the legislations insisting compulsory registration of the marriages.

The State of Andhra Pradesh passed The Andhra Pradesh Compulsory Registration of Marriages Act, 2002 (Act No.15 of 2002). The Governor has given his assent on the 21st May 2002, and it was published on the 22nd May 2002 in the Andhra Pradesh Gazette for Part-IV-B. The A.P. State Legislature has also enacted 'The Andhra Pradesh Compulsory Registration of Marriages Rules, 2003'll, vide G.O.Ms.No.35, Women Development, Child Welfare and Disabled

Welfare (Prog), dated 24-09-2003. However, the rules have not yet been implemented due to certain political and religious constraints.

The registration is only for the purposes of preserving a record of the marriages and facilitating their proof.

In *Seema v. Ashwanti Kumar* [AIR 2006 SC 1158] the Supreme Court has held that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective states, where the marriage is solemnized. Compulsory registration of marriages if wisely provided for by means of carefully framed rules – can prevent many social evils e.g., child marriage and dowry. But no State Government can make a rule that failure to register a marriage will render it invalid.

In *Shaji v. Gopinath* [1955 Madras 161] it was held that the mere registration of the marriage under Section 8 for the purpose of securing employment abroad is null and void.

Further, the Special Marriage Act, 1954, The Indian Christian Marriage Act, 1872 and the Parsi Marriage & Divorce Act, 1936 all provide for the compulsory registration of marriages, but in each of the Acts, the Registrar issues a certificate of marriage and the copies of extracts of the relevant entries are evidence of the truth of the facts stated therein.

iii) ***Free Consent:*** Parties to marriage must not only be competent to give consent and should give consent and should give consent to marry. Such consent must be freely given.

The term 'consent' literally means "agreed to" or comply or expressing willingness or giving acceptance.

Section 13 of the Indian Contract Act, 1872 defines consent as "two or more parties are said to consent, when they agree upon the same thing in the same sense and at the same time".

Free Consent (Section 14): Consent is said to be free, when it is not caused by flaws in consent viz. coercion or undue influence or fraud or misrepresentation or mistake.

Section 14 of the Act defines 'Free Consent' as Consent is said to be free, when it is not caused by:

1. Coercion as defined in Section 15; or
2. Undue influence as defined in Section 16; or
3. Fraud as defined in Section 17; or
4. Misrepresentation as defined in Section 18; or
5. Mistake, subject to the provisions of Sections 20, 21 & 22.

Where there is no consent, there is no contract:- If a consent is obtained by coercion, undue influence, fraud, misrepresentation, mistake etc., the contract is voidable. In other words, the person who is made to give such consent can avoid the contract. But, the person who obtained such consent by coercion etc., cannot avoid the contract. Thus, voidable contract is a contract, which can be avoided at the option of one party only; and not at the option of the other.

5. THE DOCTRINE OF FACTUM VALET

The 'Doctrine of Factum Valet is originated from the Roman Law maxim '*Factum Valet Quod fieri dabuit'*, which means that "what ought not to be done is valid when done". This doctrine applies, where there is a normal obligation and not legal prohibition for a thing.

The doctrine of factum valet does not apply where something is done in contravention of mandatory texts. The doctrine of factum valet has been applied in favour of the validity of a marriage which has been either irregularly performed or performed in disregard to the Hindu Law texts which are merely directory. Thus the doctrine is applicable to validate marriage with the step-mother's sister, the paternal uncle's wife's sister, the wife's sister or their respective daughters since the texts prohibiting such marriage have been held to be merely directory and not mandatory. Similarly effect has been given to the texts prohibiting marriages with the guru's daughters, girls having hideous names or brother less girls, or the marriage of the younger brother before that of the elder brother or the marriage

of the younger sister before that of the elder sister. The marriage of a girl who has attained puberty is also valid on this ground, but not a marriage of a girl who is pregnant by intercourse with a stranger.

The learned Chief Justice Divan has observed that it is no doubt anomaly that a marriage of a minor though made with guardian's consent may be pronounced to be void under Section 12(c) if the consent is vitiated by force or fraud, but such a marriage without the guardian's consent at all cannot be pronounced to be void. This was considered by him to be the inevitable consequence of the scheme of the Act.

The child marriages are neither void nor voidable. They continue to be valid even though punishable. It may be noted that by virtue of Section 12 of the Child Marriage Restraint Act, the civil courts can issue injunction against the performance of the Child Marriage, after giving opportunity to the concerned party.

The Child Marriage Restraint Act furnishes another illustration, where though the persons responsible for the marriage are punished, the validity of the marriage itself, when once performed, is unaffected.

In *Venkatramana v. State* [AIR 1978 AP 43 (FB)] the court has applied the doctrine of factum valet to child marriage and held that the marriage itself is valid though penal consequences are attracted. The child marriages are neither void nor voidable. They continue to be valid even though punishable.

6. NATURE OF HINDU MARRIAGE: WHETHER HINDU MARRIAGE IS A SACRAMENT 'OR'A CONTRACT 'OR' BOTH A SACRAMENT AND A CONTRACT

The billion dollar question is:

Whether Hindu Marriage is a sacrament (and Sacrosanct) or a Civil Contract or both the Sacrament and Civil Contract?

Marriage is the 'nucleus' of the family. It confers social status and regulates social life as well. Therefore, the very foundation of

the family and society is the marriage. In view of its great significance, Hindu Marriage is considered to be a sacrament or sacrosanct. As there are certain legislations making provision for dissolution of marriage (Sections 13 and 13-B of the Hindu Marriage Act, 1955), it may also be regarded as a contract. Therefore, it can be said that 'Hindu Marriage is both a sacrament and civil contract', for the following reasons:

A marriage to be sacramental shall comprise of the following features/constituents namely:

i) It is a permanent or indissoluble union.

ii) It is an eternal union; and

iii) It is a holy union.

The first feature i.e. permanent and indissoluble, union has been defeated since a provision is made under Section 13 and 13-B of the Hindu Marriage Act for dissolution of the marriage by divorce.

The second feature i.e. it is an eternal union, has been destroyed in 1856 by making provision for widow marriages by passing Hindu Widows Remarriage Act, 1856.

The third element i.e. it is a holy union is still retained since the competence of religious rites and ceremonies are necessary for validity of the marriage (Sec.7, Hindu Marriage Act).

The statement, that 'Hindu Marriage is both sacrament and Civil Contract can be justified with reference to the following heads:

i) Hindu Marriage is a Sacrament and Sacrosanct.

A) Ancient Texts

B) Modern Law

ii) Hindu Marriage is a Civil Contract.

i) Hindu Marriage is a Sacrament: The question that Hindu Marriage is a sacrament and sacrosanct can be answered in the affirmative with reference to its position in (A) Ancient Texts; and (B) Modern Law as explained below:

A) Ancient Texts: A Hindu Marriage is a sacrament and hence, for a Hindu, it is a samskara (religious rite or sacrament). Shabar Swamy defined the term 'samskara' as "an act by which a thing becomes fit for a certain purpose viz. dharma sampatti, praja sampatti, performance of sacrifice, rathi sukham (sexual pleasure, which without lawfully wedded wife is considered to be a sin). According to Shastras, marriage is a holy sacrament and the gift of a girl (Kanyadaan) to a suitable person is a sacred duty on the father, who derives spiritual benefit after the performance of the Kanyadan. According to Vedas, marriage is a sacred institution, which regulates social life. Hindus regard marriage as a sacramental or sacrosanct union for the following reasons:

a) According to the Sathpatha Brahmana, wife is half of the husband i.e. ardhangini. Man is only half prior to marriage and becomes fullfledged person on marriage.

b) Manu said that once man and woman are united in marriage, there should be no differences between them and must remain faithful to each other.

c) Wife being a man's half, is the source of Dharma, Artha, Kama and Moksha.

d) Marriage confers social status on man. Shastras do not allow a man without wife to honour guests, which is an act of Dharma. Similarly, there must be a son to protect father from hell and also to perform obsequies of ancestors.

e) Wife plays a significant role in social, cultural and economic life of a man. Hindu philosophy describes wife as: 1) Karyeshu Mantri 2) Karaneshu Daasi; 3) Bhojyeshu Maatha; and 4) Sayaneshu Rambha. Further, it is said that woman (wife) is instrumental for the growth and destruction of a man's career.

In *Gopala Krishna v. Mithilesh Kumar* [AIR 1979 All. 316] the Allahabad High Court laid down that, the institution of matrimony under the Hindu Law is a sacrament not a mere socio legal contract.

B) Modern Law: Hindu marriage is a holy union, since religious rites and ceremonies (Kanyadan and Saptapadi) are strictly complied with, in solemnization of a marriage (Section 7 Hindu Marriage Act). Non-observance/performance of the ceremonies (Kanyadan and Saptapadi) renders the marriage void/invalid (Eg. *Deivain Achi vs. Chidambara Chettiar*, AIR 1954 Mad. 357).

Similarly, Section 9 of the Hindu Marriage Act, 1955 strengthens matrimonial tie by making provision for restitution of the conjugal rights. In many cases, the courts decided in favour of the preservation of marriage by uniting the couple even by directing the married woman to quit employment for matrimonial society (*Tirad Kaur vs. Kirpal Singh*, AIR 1964 Puj. 28 and *Saroj Rani vs. Sudarshan Kumar*, AIR 1984 SC 1562).

In view of the above, marriage may be regarded as a sacrament and sacrosanct.

Hindu Marriage is a Civil Contract: Hindu Marriage cannot be regarded as a sacrament or sacrosanct at all times in respect of all cases. According to the modern writers of Hindu Law, Hindu marriage is not only a sacrament but also a contract. Mayne says, "while marriage according to Hindu Law is a sacrament, it is also a civil contract, which takes the form of gift". There are certain legislations in modern law, which render marriage a civil contract by making provisions for dissolution of marriage as follows:

Marriage to be sacrament, it should be indissoluble union. Sections 13 and 13-B of the Hindu Marriage Act, 1955 made provisions for dissolution of the marriage.

Similarly, the provisions for maintenance of wife under Section 18 of the Adoptions and Maintenance Act, Sections 24 & 25 of the Hindu Marriage Act and Section 125 of the Code of Criminal Procedure accelerate the inclination of a married woman to break the matrimonial tie.

Relevant Case Law:

In *Bhagwati Saran Singh v. Parmeshwari Manohar Singh* [1942 ILR All 518], the Court after quoting extensively from

Macnaghton's Hindu Law, Strange's Hindu Law and Vyavahara Chandrika, expressed the view that a Hindu Marriage is not only a sacrament but also is a contract.

In *Mathusami v. Masilamani* [33 Mad. 342], the Court has observed, "A marriage whatever else it is i.e., a sacrament or an institution, is undoubtedly a contract entered into for consideration with correlative rights and duties."

In *Anjana Dasi v. Ghose* [6 Bengal Law Reporter, p.243], the Calcutta High Court has observed that "Suits relating to marriage deal with that which in the eye of law must be treated as a civil contract and important civil rights, arise out of that contract".

Finally, the marriage to be a sacrament, it must be an eternal union. This view was liberalised in 1856 by passing of the Hindu Widows Remarriages Act, 1856.

Conclusion: In view of the above, it may be concluded that the Hindu Marriage is both a sacrament and civil contract.

7. THE SALIENT FEATURES OF THE HINDU MARRIAGE ACT, 1955

The Hindu Marriage Act (hereinafter called the Act) came into force from 18-5-1955. It governs Hindu Marriages and has brought about important changes:

Salient Features of the Act:

1. The title of the Act is the Hindu Marriage Act, 1955, though the Bill entitled "The Hindu Marriage and Divorce Bill" (Section 1(1) of the Act) was tabled in the Parliament and the Act was passed and came into force on 18th May, 1955.

2. The Act extends to the whole territory of India except the State of Jammu and Kashmir and also extends/applicable to Hindus domiciled in the territories to which this Act extends, who are outside the said territories (Section 1(2).

3. The very purpose and object of the Act is to modify substantially the institution of marriage and to lay down the uniform

and comprehensive rules of marriage applicable to all Hindus as recognized by ancient Hindu Law.

4. Marriage between persons belonging to Hindu, Jain or Sikh religion is valid (Sections 2,4,5).

5. The Act permits intercaste and sagotra or sapravara marriages.

6. The Act does not accord much importance to the eight ancient forms of marriage and various forms of marriage ceremonies. The parties to marriage are free to adopt any form of marriage prevailing in their community/as per their customary practice. It also abolished the distinction between the marriage of maiden and that of a widow. The Act removed the prohibition of widow marriages and the disqualification of a widow to get remarried was abolished with the passing of the Hindu Widow's Remarriage Act, 1956.

7. *Age Limit :* The Act prescribed the minimum age for boy as 21 and for girl as 18 years (Section 5). There was no such age restriction under the ancient Hindu Law.

8. *Monogamy (Section 5) :* Under the Act, monogamy is made mandatory for the validity of a marriage. Monogamy means having only one spouse. The party seeking marriage should not have a spouse, living at the time of the marriage.

9. *Degrees of Prohibited Relationship:* The distinctions between the Mitakshara and Dayabhaga particularly in the case of prohibited degrees of relationship have been taken away (Sec.3 (f) and (g).

10. *Marriage Ceremonies (Sec.7):* The act does not prescribe any particular ceremonies and permits any ceremonies of the respective parties to the marriage. According to Sec.7(2) of the Act, two ceremonies viz. Kanyadan and Saptapadi are essential for the validity of the marriage.

11. *Registration (Sec.8):* The Act made provision for the registration of the marriage.

12. *Restitution of Conjugal Rights (Sec.9):* The Act made provision for the Restitution of Conjugal Rights. If one spouse leaves

the other spouse, the deserted spouse may file a petition in the District Court for the Restitution of Conjugal Rights under Section 9 of the Act.

13. *Judicial Separation (Sec. 10 & 13.A):* The Act made a provision for Judicial Separation, which means suspension of conjugal rights for some period (i.e. one year).

14. *Nullity and Annulment of Marriage:* Termination of marriage is made possible under Sections 11 and 12 of the Act.

15. *Divorce (Sec.13):* 'Divorce' is a process by which the marriage is dissolved. Section 13 of the Act, provides for various grounds for Divorce.

16. *Divorce by Mutual Consent (Sec.13-B):* Divorce by mutual consent has been recognised by the Amendment Act of 1976. A divorcee can now, remarry immediately without waiting for one year as prescribed by Section 15.

17. *Legitimation (Sec.16):* Section 16 of the Act made provision for legitimacy of the illegitimate children.

18. *Maintenance of Minor Children (Sec.26):* The Act empowered the Courts to pass appropriate orders for the custody and maintenance of the Minor Children (Sec.26).

8. CHANGES MADE BY THE AMENDMENT ACT OF 1976 *(ACT NO.68 OF 1976)*

The Hindu Marriage Act was passed in 1955. Later, it was amended by the Act No.73 of 1956, 58 of 1960, 44 of 1964 and 68 of 1976. The changes made by the Amendment Act of 1976 (hereinafter called the Act of 1976) are of great importance as enumerated hereunder:

1. *Changes with regard to Divorce:* Before 1976, according to a proviso under Sec.15, the parties, after the decree of divorce had to wait for atleast one year to get remarried. This proviso was omitted by the Act of 1976. However, the parties have to wait until the time of limitation for appeal is expired or the appeal if already filed has been dismissed.

2. With a view to expedite the disposal of a matrimonial petition, a provision has been made in the Amendment Act that the trial should conclude within a period of six months, and the appeal within three months.

3. The interim period between Judicial Separation and divorce has been reduced to one year (instead of two years) now and appeals from interim orders stand abolished.

4. The Act further provides that every matrimonial proceedings should be conducted in camera from now onwards.

5. *Changes in regard to Marriage:*

i) The Act of 1976 introduced the following new conditions for conditions of a marriage (Sec.5).

   a) Neither party should be suffering from mental disorder, though falling short of unsoundness of mind.

   b) Neither party should have been subject to recurrent attacks of epilepsy or insanity.

ii) *Restitution of Conjugal Rights (Sec.9):* The Act of 1976 imposed the burden of proof on the respondent that there was a reasonable excuse for withdrawal of conjugal society.

iii) *Judicial Separation (Sec.10):* After the Act of 1976, the grounds for judicial separation and divorce are made common.

iv) *Voidable Marriage (Annulment of Marriage) (Sec.12):*

   a) *Impotence:* Before 1976, it had to be shown that the disability (impotence) was existing at the time of the marriage. After 1976, if it is proved that the marriage is not successfully consummated, it is sufficient.

   b) *Fraud:* Another ground for annulment of the marriage is fraud. It is clarified under the Act of 1976 that such fraud may be as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent.

v) *Status of children of void and voidable marriage:*— After the Act of 1976, the children of a void marriage are treated by a friction as legitimate for the limited purpose of inheritance to the parents. Before 1976, a decree of Nullity had to be obtained under the Act before this friction could operate. (To confer legitimacy on the children of a void marriage, decree of nullity was necessary before 1976).

vi) *Jurisdiction of Courts:*

a) *Place of suing:* After 1976, the petition for matrimonial relief has to be filed in the District Court within whose jurisdiction the respondent resides. If the respondent is outside India or has been unheard for 7 years, the petition can be filed in the District Court, within whose jurisdiction, the petitioner resides.

b) *Power to transfer the petition:* If both the parties filed petitions in the same court, they should be clubbed together. If both the parties filed petitions in the different courts, the later filed petition should be transferred to the court, where the earlier filed petition was pending.

c) *Time-limits for disposal:* To ensure speedy disposal, the petition should be disposed of within 6 months from the date of service of notice to the respondent. Similarly, an appeal should be disposed of within 3 months from the date of service of notice of appeal on the respondent.

d) *Relief for Respondent:* When a petition was opposed on the ground of the petitioner's cruelty, adultery or desertion, the court may grant appropriate relief to the respondent in the same proceeding without insisting on the respondent to file a separate petition.

e) *Power of the Court to modify or rescind decree:* The Act of 1976 confers on the Court, power to vary, modify or rescind the decree as it deems fit.

f) *Provision for Appeals:*— There were no specific provisions for appeals. The Act of 1976, made explicit provisions for appeals from the orders or decrees passed under the Act.

6. Sections 21-A, 22-B and 21-C have been newly added to Section 21 of the Act. These sections regulate the transfer and disposal of matrimonial petition when presented in different courts by the parties to a marriage. The court has been conferred the jurisdiction to deal with the case, to which the petition was made at an earlier date by either spouse. These Sections also made it incumbent on the court to decide the case within six months and in case of appeal within three months.

The Amendment Act 1976 marked the end of the Sastric Law of marriage and the beginning of a secular law of marriage by modifying the procedures of dissolution of the marriage according to the changed conditions of modern society in India.

CASE COMMENT (PART-C)

In Andhra Pradesh, the questions on Case Comment are asked under Part-C. The question may be in form of a problem (Eg. A.U., S.V.U) or in form of a case itself (Eg. N.U.). The necessary guidelines as to how to answer the cases or problems under Part-C are detailed below:

Q) Discuss facts and the law laid down in — Deivain Achi vs. Chidambara Chettiar, AIR 1954 Mad. 657. (N.U. April '99, Part-C, Q.15, Marks 20).

Ans. Instant case relates/refers to 'customary rites and ceremonies or marriage ceremonies' which are essential for the validity of a marriage under the modern Hindu Law and Ancient Texts as well.

It attracts the principle enshrined in Sec.7(2) of the Hindu Marriage Act, 1955. The performance of the customary rites and ceremonies, which include 'Saptapadi', is mandatory (for validity of a Hindu marriage) under Sec.7(2) of the Act.

The instant case is the relevant leading case on this point and is detailed below:

Deivain Achi vs. Chidambara Chettiar, AIR 1954 Mad. 657:

Facts of the Case: In this case, marriage between a widow Reddy girl and a widower, Chidambara Chettiar was solemnized under the auspices of an Anti Purohit Association by exchanging the garlands and rings in the presence of their elders, friends and invitees. They read a declaration to share joys and sorrows of each other. As the members of Anti Purohit Association, the parties to the marriage do not believe in customs, Purohits/priests officiating at marriages and hence, the customary rites and ceremonies of either spouse were not performed. A few years after the marriage, the wife filed a petition/ complaint against her husband for the offence of bigamy. The husband challenged the validity of the marriage on the ground that no ceremonies of marriage were performed.

Decision/Judgment: The Madras High Court through Satyanarayanarao and Rajagopalan, JJ. rejected the contention that "the exchange of garlands is sufficient for a valid marriage" and held that there was no valid marriage between the parties since the customary ceremonies were not performed.

Principle: The principle involved in the instant case is, the marriage ceremonies, which include 'Saptapadi' as prescribed under Sec.7(2) of the Hindu Marriage Act, 1955 is mandatory to constitute a valid marriage.

Marriage Ceremonies: Section 7 of the Hindu Marriage Act, which prescribes "Ceremonies for a Hindu Marriage" reads as follows:

1. A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

2. Where such rites and ceremonies include the 'Saptapadi', the marriage becomes complete and binding, when the seventh step is taken.

Among the various marriage ceremonies of Hindus viz. Kanyadan, Saptapadi, Ganapat Puja, Nandi Devatas Puja etc. etc.,

Sec.7(2) of the Act prescribes (i) Kanyadan; and (ii) Saptapadi as the essential marriage ceremonies and Saptapadi is mandatory for validity of the Hindu Marriage.

The word 'Sapta' means "seven" and 'Padi' means "walking steps". 'Saptapadi' means "walking/taking seven steps by the bridegroom and the bride jointly around the sacred fire (pronouncing certain Manthras and pledging mutual fidelity with the Agni or sacred fire as witness).

The other ceremony 'Kanyadan' means "Giving away the bride, by the father as gift to the bridegroom". (While delivering the gift/ performing Kanyadan, the bride's father says "My unmarried daughter, who is shining in her decorations and who is fit to be devoted wife, to thee of good character and wisdom, I give for the attainment of Dharma, Artha and Kama).

The Court, while delivering the judgement explained at length the importance of the religious ceremonies and opined that the marriage performed will have social sanction only when the customary rites and ceremonies are observed. The Court made it very clear that the customary ceremonial cannot be altered except by legislation such as the Special Marriage Act, 1954. Therefore, the alteration made by such society or Association cannot be accepted and held the marriage void.

Problem: Raju married Rani at Mysore by merely exchanging garlands before a small gathering of friends and relatives. Raju claims that the marriage is not valid as the ceremonies are not followed. Advise Rani (A.U., July 2000, Part-C, Q.2, Marks: 20).

Ans. Instant problem refers to Section 7 of the Hindu Marriage Act, 1955, which speaks about the significance and requirement of the marriage ceremonies for the validity of a Hindu Marriage.

The relevant leading cases on this point are:

1. *Deivain Achi vs. Chidambara Chettiar*, AIR 1954, Mad. 657.

2. *Dr. N.A. Mukerji vs. State*, AIR 1969, All 489; and

3. *Priya Bala vs. Suresh,* AIR 1971, SC 1153.

Issues Involved: The issues involved in the instant case are:

1. Whether the performance of marriage ceremonies is essential, mandatory for validity of a Hindu Marriage?

2. Whether the exchange of garlands constitutes a marriage ceremony and the marriage between Raju and Rani is valid?

With regard to the first question, Section 7 of the Hindu Marriage Act, 1955 affirms that, the performance of marriage ceremonies is essential for validity of a Hindu Marriage. The widely accepted marriage ceremonies are Kanyadan and Saptapadi.

Regarding the second question, exchange of garlands does not constitute a marriage ceremony, and the marriage between Raju and Rani is not valid.

The above question can be answered better with reference to the following case law:

Deivain Achi vs. Chidambara Chettiar, AIR 1954 Mad. 657.

1. Write now Facts of the Case, Judgement, Principles etc. in detail as above.

2. The student may also write in brief the Facts of *Dr. D.A. Mukherji vs. State, and Priya Bata vs. Suresh.*

Conclusion: In view of the above discussion, the marriage between Raju and Rani is not valid since the marriage ceremonies were not performed at the time of the marriage.

Similar problems were asked subsequently by A.U., S.V.U. as follows:

Problem: 'A' married 'B' by exchange of garlands in a temple. Later, 'A' married 'C' by performing Saptapadi. 'B" and 'C' belong to communities in which Saptapadi is essential marriage ceremony. 'B', on coming to know of 'A's second marriage, sought declaration that marriage between 'A' and 'C' is null and void... Decide. (S.V.U., Nov. 1999, Part-C, Q.16, Marks: 20).

Problem: 'P' married 'Q' by exchange of garlands in a temple. Later, 'P' marries 'R' by performing essential conditions of marriage. 'Q' on coming to know of 'P's second marriage sought declaration that marriage between 'P' and 'R' is null and void... Decide. (A.U., Nov./Dec. 2000, Part-C, Q-1, Marks:20).

QUESTIONS AND HOW TO ANSWER

Q. Give an account of essential conditions of Hindu Marriage. (A.U. Model Q.P., Part-B, Q.4; and N.U. Sept. 1999, Part-B, Q.12, Marks:18)

Ans. Write the meaning of Hindu in brief (one paragraph), name the persons governed by Hindu Law (in 2nd para) and then write the conditions of marriage under Ancient texts (old law) and under Sec.5 of the Hindu Marriage Act, 1955.

Q. What is the scope of 'MONOGAMY' as a condition of Hindu Marriage (N.U., April 1999, Part-A, Q.5, Marks:4)

Ans. Monogamy is an essential condition for the validity of a Hindu Marriage under Sec.5(i) of the Hindu Marriage Act, 1955. Write now, about Monogamy in brief (one paragraph/ one page).

Q. What is the importance of 'SAPTAPADI' in Hindu Marriage (N.U. Sept. 1999, Part-A, Q.1 Marks: 4)

Ans. 'Saptapadi' is the widely accepted sastric ceremony for the validity of a Hindu marriage. According to Sec.7(2) of the Hindu Marriage Act, 1955, performance of Saptapadi is mandatory. Write now, about Saptapadi in brief and *Deivain Achi vs. Chidambara Chettiar* case in 3 to 4 lines.

Q. Essential ceremonies of valid marriage (A.U., July 2000, Part-A, Q.9, Marks: 4)

Q. Sapinda relationship (S.V.U. Nov. 1999, Part-A, Q.9, Marks:4)

Ans. The relationship between two sapindas is called "Sapinda

Relationship". Now, write about it in brief from conditions of Hindu Marriage under Sec.5(v)

Q. "Hindu marriage is neither a sacrament nor a contract" - Elucidate (S.V.U., Nov. '99, Part-B, Q.10, Marks:18)

Ans. Write about the meaning of Hindu marriage in brief and then write about the quotation "Whether Hindu marriage is a sacrament or a contract or both" in detail.

Lecture - III : Matrimonial Remedies

The very purpose of the marriage is to unite legally a man and woman to live together peacefully throughout the life. However, in some cases, matrimonial disputes take place due to misunderstanding or indifferent attitudes between the husband and wife. In such cases, to provide relief to the aggrieved spouse, certain matrimonial remedies are incorporated in the Hindu Marriage Act, 1955. This lecture deals with the matrimonial remedies namely:

1. Restitution of Conjugal Rights (Sec.9);
2. Judicial Separation (Sec.10);
3. Void and Voidable Marriage (Ss.11 & 12) (Nullity and Annulment of Marriage)
4. Divorce (Sec.13); and
5. Divorce by Mutual Consent (Sec.13-B).

1. RESTITUTION OF CONJUGAL RIGHTS

Marriage is a nucleus of social life. The very purpose of marriage is that the legally wedded couple must live together throughout the life sharing pleasures and pains. It is a well established principle that both the spouses are equally entitled to matrimonial society and comfort (consortium) of the other. In case one spouse happens to leave the other from the matrimonial society without any reasonable cause, the other (deserted) spouse can file a petition in the District Court for the restitution of conjugal rights. For instance, if a husband, without any reasonable cause leaves his wife and lives elsewhere, wife can file a petition for the restitution of conjugal rights of the Hindu Marriage Act, 1955. A provision to this effect has been provided for under Section 9, which runs as follows:

"When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the

application should not be granted may decree restitution of conjugal rights accordingly."

Thus under sub-section (1) of Section 9, the husband or the wife may get a decree for restitution of conjugal rights, where the wife or the husband, as the case may be:

a) has withdrawn from the society of the other,

b) without reasonable excuse,

c) the court is satisfied of the truth of the statements made in the petition, and

d) there is no legal ground why the application should not be granted.

The explanation added to the section provides that where a question arises whether there has been reasonable excuse for withdrawal from society, the burden of proving reasonable excuse shall be on person who has withdrawn from the society (*Krishnamurthy v. Syamanthakamani*, 1977 HLR 163).

Originally there was sub-section (2) also but the same was omitted by Marriage Laws (Amendment) Act, 1976.

This concept is based upon English Matrimonial Law. In India, it was applied by the Privy Council for the first time in 1866 in *Moonshee Bazloor vs. Shamsoonaissa Begum* (1866-67) (ii) Moo.Ind. App.551). However, this remedy was abolished in England in 1970.

The expression 'Reasonable Excuse' has been inserted under the Amendment Act of 1976. The burden of proving reasonable excuse is on the spouse, who has withdrawn from the society of the other.

Conditions: The relief under Section 9 is subject to fulfillment of the following conditions:

i) The marriage between the parties must be a valid marriage under Sec.5 of the Hindu Marriage Act, 1955.

ii) The respondent has withdrawn from the society of the petitioner without reasonable excuse.

iii) The Court is satisfied with the truth of the statements, made in the petition.

iv) There is no legal ground, why the relief should not be granted.

i) Valid Marriage: To seek relief under Section 9, primarily the marriage must be a valid marriage under Section 5 of the Act. Following case law explains on this point.

The petition for restitution of conjugal rights under Section 9 of the Act is not maintainable, if the marriage of the parties (petitioner and respondents), is not a valid marriage and was subsisting at the time of the petition. The relevant case on this point is-

Parbia Ram v. Thopali [AIR 1966 HP 20] – In this case, it was held that if, the parties of restitution of conjugal rights petition are not legally married or the marriage was not subsisting at the time of petition, the question of granting of decree of restitution of conjugal rights does not arise. In *Laxmi Singh v Kehrabai* [AIR 1966 M.P. 166], it was held that it was for the petitioner to prove the validity of the marriage if it was disputed by the respondent.

Ranjan Vinod Kumar Kujiwal v. V.K.Kerjiwal [AIR 1997 Bom. 380], it has been held that where the petitioner wife herself alleging that her husband has suppressed his first marriage and it was subsisting, her marriage being illegal, petition for restitution of conjugal rights was not maintainable.

Where the respondent contends the petition under Section 9 is not maintainable on the ground that necessary marriage ceremonies were not performed, the burden of proof is shouldered on the respondent. The relevant case on this point is–

Mallikarjunappa v. Yerramma [ILR 1971 AP 163] – In this case, it was held that where the husband contended that the marriage was not valid as the necessary ceremonies were not performed, it was the husband that had to prove the non-performance of necessary ceremonies as there was presumption of a valid marriage as once the factum of marriage was proved.

ii) Withdrawal from Society: The expression 'withdrawal from the society means cessation of cohabitation or bring to an end consortium. The expression 'withdrawal from the society of the other' involves a mental process besides physical separation. The act of temporarily leaving the matrimonial home would not amount to withdrawal from the society of the other, when she had no intention to withdraw permanently. 'Withdrawal from the society' means that it is withdrawal from the totality of conjugal relationship, such as refusal to live together, refusal to have marital intercourse and refusal to live in company and comfort.

In *Venugopal v. Laxmi* [AIR 1936 Mad. 288], it was held that in a petition for restitution, it was not required to show that the parties were cohabiting earlier and where spouses had not cohabited at any time after the marriage, a petition for restitution would lie if intention not to cohabit was established.

iii) Reasonable Cause: The expression 'reasonable cause' is not defined in the Act. What is reasonable or just would be decided in the context of facts and circumstances of each case, no strait-jacket formula can be formulated for ascertaining reasonable or just grounds. The reason for withdrawal from the society must be 'grave and weighty' and it may be distinct from a matrimonial offence.

Whether Living separately for job amounts to reasonable cause?

In all societies, the universally accepted opinion is that wife and husband must live under the same roof sharing pleasures and pains and the wife must be obedient to her husband. Manu has said – 'The wife should obey her lord'.

However, in the modern society, under rapid changing socio-economic cultural environment, a number of house-wives are taking up employment, which occasionally becomes cause for conflict between her job and marital obligations. The question arises whether taking up of a job by a wife, as a place other than that of her husband, or at husband's desire to give-up her job, amounts to desertion and her withdrawal from the society of her husband without reasonable

excuse and whether the husband could get a decree of restitution of conjugal rights?

Tirad Kaur vs. Kirpal Singh, AIR 1964 Punj. 28:— In the instant case, the respondent (wife) with the consent of her husband had undergone tailoring course and joined employment elsewhere. After sometime, she was asked to resign the job (by her husband). As she refused to do so, the husband filed a petition under Sec.9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights.

The question as to the course to be adopted if the wife refused to resign her job and the husband refused to allow the wife to continue in the job is difficult to decide. Mere refusal on the wife's part to resign her job is not a sufficient ground for the husband to seek relief for the restitution of conjugal rights. The Courts have to decide on the circumstances of each case which of the parties is reasonable. If the attitude of the wife is reasonable the Court may dismiss the suit in its discretionary jurisdiction. If it is unreasonable it will decree the suit on the ground that the wife has no just defence to the action.

This matter came up for decision in *Kailashwati v. Ayodhiya Prakash* (AIR 1977 Raj. 113) and *Mirchulal v. Smt. Devi Bai* (1977 HLR 175), in the former case the Punjab and Haryana High Courts held that wife is under an obligation to live with her husband in his home and under his roof except in case of distinct and specific misconduct on the part of the husband. Where the wife against the wishes of her husband accepts employment away from the matrimonial home and unilaterally withdraws therefrom, she would be violating the mutual obligations of husband and wife to live together. In the latter case the Rajasthan High Court and Allahabad High Court in *Shanti Nigam v. R.C.Nigam* (AIR 1975 Alld. 337) however took a more liberal view. The Rajasthan High Court in *Mirchulal v. Devi Bai* (AIR 1977 Raj. 113) observed: it is true that according to principles of Hindu law a wife after marriage is bound to be dutiful towards her husband and remain under the obligations of her husband in his house, but the concept of protection of the husband and unbroken residence in his house are not inelastic and rigid rules which cannot be interpreted in the context of present day conditions and needs

of society. Women are now no longer confined within the walls of their houses. There might be cases where on account of family circumstances a woman might have to live by herself while the husband is working at a place where he cannot take his wife along with him. Again, a wife may be bread winner of the family, the husband being infirm or out of employment. If under such compelling circumstances, a wife has to live away from husband, such situation would not be said to run counter to the spirit of the Hindu law. In such situation it cannot be said that she has withdrawn herself from the society of her husband. It is one thing for a wife to say that she will not go to her husband and will not cohabit with him. It is different if she says that it is necessary for the up-keep of the family that she should also work and she should also go to her husband whenever it is possible for her to do so and her husband could also come to her at his own convenience.

The Madras High Court in *N.R.Radha Krishna v. Dhana Lakshmi* (AIR 1957 Mad. 337) and the Gujarat High Court in *Pravinaben v. Suresh Bhai* (AIR 1975 Guj. 69) also expressed the same view by holding that a wife, living separate from her husband by taking up a job somewhere else owing to financial exigencies or by an implied and mutual arrangement arrived at by her and her husband, cannot be said to have withdrawn unreasonably from her husband's society.

The High Court of Delhi pronounced an important judgment in the case of *Smt. Swaraj Garg v. K.M.Garg* (AIR 1978 Delhi 296) in which the husband and wife were gainfully employed at two different places from days before their marriage and a question arose with respect to matrimonial home after the marriage. It was a matter of chance that the husband, although well qualified did not get a satisfactory job and was drawing a pay packet of lesser amount than that of his wife. The parties to marriage either before the marriage or at any time after it, did not discuss nor came to an agreement as to where their matrimonial home would be after the marriage. The wife even after the marriage continued to live at the place where she was working although she had come twice to Delhi to live with him where the husband was serving.

The husband filed a petition for restitution of conjugal rights against his wife on the ground that she had withdrawn from his association without reasonable excuse within the meaning of Section 9 of the Act. The trial court dismissed the petition but the single judge bench allowed the appeal and granted the restitution. Against the decree the matter was brought before a division bench. Mr. Desh Pande, J. while dismissing the decree of restitution of conjugal rights observed: 'At the present numerous women have taken up jobs to help their family and also to be useful members of the society, it may be that the wife is financially and in other respects better situated to choose the place of matrimonial home than the husband. There is no warrant in Hindu law to regard a Hindu wife as having no say in choosing the place of matrimonial home. Article 14 of the Constitution guarantees equality before law and equal protection of law to the husband and wife. Any law which would give an exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Article 14 and unconstitutional for that reason.' The judges also recommended to the legislature to amend the law to enable the parties to directly obtain divorce when the marriage had apparently broken down as seemed to be the case between the parties in this case.

The above case undoubtedly has been decided correctly but the observations of the court with respect to matrimonial home and the concept of fundamental rights introduced in the affairs of matrimonial life of the husband and wife are not free from controversies. The concept of matrimonial home is well established in Hindu Dharmashastras which clearly pronounces that the husband's home whenever may be, is matrimonial home as the fact is that the husband normally goes to the bride's place, marries with her and takes her to his place of residence which is called matrimonial home. Moreover the entire matrimonial edifice is founded on mutual love, trust, sacrifice and devotion, to introduce the concept of fundamental right in this relationship would be hazardous and lead to litigative tendencies in the matrimonial life of Hindus.

In *Shanti Nigam v. Ramesh Chandra Nigam* [AIR 1971 All. 567], it was held that mere refusal to quit the job is not a ground to order restitution, where she allows access to her husband and there is no reluctance on her part in going to her husband.

iv) No legal ground to deny the Relief: If the Court is satisfied with the truth or genuineness of the statement made in the petition and there is no legal ground, why the relief should not be granted, the court will pass the decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955.

An agreement to live separately is not valid: If the parties to marriage have entered into an agreement to live separately, such agreement is not valid.

Petearaju vs. Radha, AIR 1965 A.P. 407 — In this case, there was a pre-natal agreement to live separately. The husband agreed to live with his wife at her foster father's house. After the marriage, he returned to his home and wanted his wife to live with him. On her refusal, he filed a petition under Section 9. The Court granted decree on the ground that 'an agreement to live separately is not valid'.

Sunil Kumar vs. Swarna Dutt, AIR 1982 Gauhati 36 — In this case, the wife left her husband since two of his relations, suffering from T.B. (Tuberculosis) were staying with them. In an action against the wife under Sec.9 of the Hindu Marriage Act, it was held that there was a reasonable cause on the part of the wife to leave the matrimonial home.

Cruelty on the part of one spouse is a reasonable cause: Cruelty on the part of one spouse is a reasonable cause to the other spouse to withdraw from the society of the other spouse. Relevant Case on this point is:

Sumanbai vs. Anand Rao, AIR 1976 Bom. 212 — In this case it was held that baseless imputation of unchastity on wife amounts to cruelty and is a reasonable cause to the wife to withdraw from the society of her husband.

Further, impotency on the part of husband; insisting upon wife to take non-vegetarian; to smoke and to drink alcohol etc. amounts to reasonable cause.

Wife entitled to maintenance: If the wife has a reasonable cause to withdraw herself from her husband's society; she is entitled to maintenance and separate residence under Section 18 of the Hindu Adoptions and Maintenance Act, 1956; Sections 24 & 25, Hindu Marriage Act, 1955 and Section 125 of the Code of Criminal Procedure 1973.

Constitutional validity of Section 9: Sometimes, a decree in favour of the husband under Section 9 of the Hindu Marriage Act may deprive a wife from the personal liberty and employment of her choice. Such situations are quite obvious in the society. For instance, if a wife is employed in different place, her husband may ask her to resign and join him. If she refuses to resign, the husband may file a petition and the Court may direct her to join the husband under Section 9. Then, the question is: Whether Section 9 of the Hindu Marriage Act is violative of Arts. 14 and 21 of the Indian Constitution. This question came for discussion before the A.P. High Court in the leading case of:

T. Sareetha vs. T. Venkata Subbiah, AIR 1983, A.P. 356 — The Andhra Pradesh High Court through P.A. Chowdary held that the relief under Sec.9 of Hindu Marriage Act is unconstitutional since it offends against Article 21 (personal liberty) and Article 14 (Right to equality) of the Constitution.

Facts of the Case: Sareetha, a famous film star got married to Venkata Subbaiah, the petitioner in the instant case. After sometime, she left for parental home, Madras and remained there. Venkata Subbaiah filed a petition under Section 9. The trial Court granted the decree. On appeal, the A.P. High Court through Justice P.A. Chowdary denied the relief under Sec. 9 of the Hindu Marriage Act, and struck down Section 9 holding that it violates the wife's right to privacy by compelling her to have sexual intercourse (probably leading to pregnancy) against her will. The husband's petition under Section 9 was dismissed.

However, the decision of the A.P. High Court in Sareetha's case was dissented and the constitutionality of Section 9 was upheld by the Delhi High Court in the case of:

Smt. Harvinder Kaur vs. Harmandir Singh AIR 1984 Del.66 — The husband filed a petition against his wife for restitution of conjugal rights under Sec. 9. The respondent (wife) opposed the petition in support of the decision of the A.P. High Court in Sareetha's case. But, the court (Delhi High Court) through Justice Avadh Behari Rohatgi dissented from the decision of A.P. High Court and upheld the constitutionality of Sec.9 and granted a decree for restitution of conjugal rights.

Decision of the Supreme Court: The above conflict as to the constitutional validity of Sec.9 of the Hindu Marriage Act, 1955 was resolved finally, by the Supreme Court in:

Saroj Rani vs. Sudarshan Kumar, AIR 1984 SC 1562 — The Court favouring the decision of the Delhi High Court (in *Smt. Harvinder Kaur vs. Harmander Singh*), overruled the decision of the A.P. High Court in Sareetha's case and upheld the constitutional validity of Sec.9 of the Hindu Marriage Act.

The Court opined that the leading idea of Section 9 is to preserve the marriage. It was held that the remedy under Sec.9 of the Hindu Marriage Act is not at all violative of Article 14 or 21 of the Constitution.

Mode of execution of decree for restitution of conjugal rights: Order 21 Rules 32 and 33 of the Code of Civil Procedure provides for the execution of a decree for restitution of conjugal rights. Where the party against whom a decree for restitution of conjugal rights is passed, has an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by attachment of his property or by his detention in civil prison or by both. Where any attachment made under the circumstances, has remained in force for one year, and if the party has not obeyed the decree and the decree-holder has applied to sale of the attached property so that out of the proceeds of the sale, he could get such compensation as the court proceeds to award.

In a decree for restitution, the party, against whom the decree is passed, cannot be compelled physically to restore cohabitation. A court is not competent to direct that the wife or husband be, bodily handed over to other spouse and restrain him or her of liberty until he or she is willing to render him or her conjugal rights.

The decree in India is used as a stepping stone for getting a decree of divorce under Section 13(1-A) of the Act after the expiry of one year from the date of the decree of restitution of conjugal rights.

2. JUDICIAL SEPARATION (SECTION 10)

Meaning: Judicial Separation means suspension of Conjugal Rights for some time i.e. one year. Section 10 of the Hindu Marriage Act deals with judicial separation. This section lays down–

Section 10(1)– 'Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.'

Section 10(2) – 'Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may on the application by petition of either party and on being satisfied of the truth of the statements made in such petition rescind the decree if it considers it just and reasonable to do so.'

During the period of judicial separation, the parties to the marriage have no obligation to live together or cohabit with each other. During the course of judicial separation either party may be entitled to get maintenance from the other if the situation so warrants. But during this period the husband or the wife would not acquire the competence to marry afresh. The right of fresh marriage would be available to them only after the dissolution of marriage.

Section 10 provides that either party to marriage may present

a petition praying for a decree of judicial separation on any of the grounds specified in sub-section (1) of Section 13 and in case of wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

Under the Marriage Laws (Amendment) Act, 1976, the section has been completely overhauled. The grounds of judicial separation are virtually the same which have been provided to be grounds of divorce under Section 13(1) and (2) of the Act and accordingly the judicial separation, under the amended Act of 1976, can be obtained under following grounds.

Before 1976, the grounds available for Judicial Separation were:

i) Desertion.
ii) Cruelty.
iii) Leprosy.
iv) Venereal Disease.
v) Insanity or Unsoundness of mind, and
vi) Adultery.

After the Amendment Act of 1976, the ground available for Divorce and Judicial Separation are common as detailed below:

A) Grounds available for both husband and wife:

i) Adultery.
ii) Cruelty.
iii) Desertion.
iv) Conversion.
v) Unsoundness of mind.
vi) xxx (Omitted in 2019)
vii) Venereal disease.
viii) Renunciation of world.
ix) Presumed death.

i) Adultery: Where the other party has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse. Under the Marriage Laws (Amendment) Act, 1976, the expression 'living in adultery' has been dispensed with and it has been replaced by a simple requirement of adultery, that is, voluntary sexual intercourse with any person other than his or her spouse. And thus, even a single act of adultery may be sufficient now for the relief under this head.

ii) Cruelty: Where the other party has treated the petitioner with cruelty.

iii) Desertion: Where the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Desertion in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of desertion in order that it may furnish a ground for relief are:

1) The factum of separation.

2) The intention to bring cohabitation permanently to an end – *animus deserendi*.

3) The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period of not less than two years (*Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi*, AIR 2002 SC 88).

The expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage.

iv) Conversion: Where the other party has ceased to be a Hindu by conversion to another religion.

v) Unsoundness of mind: Where the other party has been of incurable unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an

extent that the petitioner cannot reasonably be expected to live with the respondent.

The expression 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind, and includes schizophrenia. Further, the expression psychopathic disorder means a persistent disorder or disability of mind which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.

vi) Leprosy: Omitted

vii) Venereal disease: Where the other party has been suffering from venereal disease in a communicable form.

viii) Renunciation of world: Where the other party has renounced the world by entering any religious order.

ix) Presumed death: Where the other party has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it had that party been alive.

B) Grounds Available to Wife Alone:

i) Bigamy.

ii) Rape, Sodomy or Bestiality.

iii) Non-resumption of cohabitation after decree or order of maintenance.

iv) Option of puberty.

i) Bigamy: In the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner; or

ii) Rape, Sodomy or Bestiality: That the husband has since the solemnization of the marriage, been guilty of rape or sodomy or bestiality; or

iii) Non-resumption of cohabitation after decree or order of maintenance: That where a suit under Section 18 of the Hindu Adoptions and Maintenance Act or in a proceeding under Section 125 of the Code of Criminal Procedure 1973, a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upward; or

iv) Option of puberty: That her marriage was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining the age of fifteen years but before attaining the age of eighteen years.

These four additional grounds given above, are available to a wife whether her marriage was solemnized before or after the commencement of Marriage Laws (Amendment) Act of 1976.

Effects or Consequences of Judicial Separation: Following are the sequences of judicial separation.

i) That the marriage tie is not dissolved.

ii) That after the passing of the decree of judicial separation, the husband and wife are not bound to live together or dine together as judicial separation is separation from bed and board.

iii) After the decree of judicial separation it will not be obligatory for the parties to cohabit with each other.

iv) It does not prevent the parties from subsequently resuming cohabitation and living together as husband and wife as originally they did. It is not necessary for them to undergo the ceremony of marriage again because their original marriage still subsists in spite of the decree of judicial separation.

v) A fortiori if either spouse marries during that period, he or she will be guilty of bigamy and will be liable for punishment prescribed by Section 17 of this Act.

vi) The petitioner, if she be the wife, becomes entitled to alimony from the husband, and if he is the husband he can claim maintenance from wife under Section 25 of this Act.

vii) The wife shall, from the date of the decree and till separation continues, be considered as a femme sole, i.e. 'independent woman' with respect to property of every description.

viii) The mutual rights and obligations arising from the marriage are suspended and the rights and duties prescribed by the decree are substituted therefor.

Defences to Respondent: The defences open to a respondent in a petition for judicial separation are:

1. Statutory time limits as to disability have not been fulfilled.
2. Alleged acts of cruelty do not amount to legal cruelty.
3. Alleged desertion does not constitute legal desertion.

Relevant Case Law:

In *Shyam Chand v. Janki* (1966 HP 70), where the husband asked for judicial separation on the ground of wife's desertion, the wife in her reply stated that she was maltreated, beaten up and turned out of his house by the husband. She further stated that her husband kept her in village Bedar, while he himself lived at Ghorus and the food given to her at Bedar was meager. She was kept there in a cow-shed, was deprived of the company of her children, was beaten up and ultimately turned out. The wife's averments were proved.

Shakuntala v. Om Prakash (1981 Del 53) – In this case, it was held that, to constitute a ground for judicial separation or divorce, desertion must be for the entire statutory period of two years, preceding the date of presentation of the petition.

3. VOID AND VOIDABLE MARRIAGE (SS. 11 & 12) *(NULLITY AND ANNULMENT OF MARRIAGE)*

Section 5 of the Hindu Marriage Act, 1955 deals with valid marriage. While Sections 11 & 12 of the Act deal with void and voidable marriages respectively a valid marriage is one, which fulfils

the conditions viz. (1) Monogamy; (2) the parties are not within the degrees of prohibited relationship; and (3) not related to sapindas as enshrined in Section 5(i), (iv) and (v) of the Act respectively. A void marriage is one, which does not fulfil any one of the above three conditions. A voidable marriage is one, which can be avoided at the option of one party/parties to the marriage. As the valid marriage had already been discussed in Lecture II, Void and Voidable Marriages are discussed below in detail.

A. Void Marriage (Section 11) (Nullity of Marriage)

Meaning: A void marriage is no marriage at all. It does not exist from the very beginning. Section 11 of the Hindu Marriage Act deals with void marriage. It reads as follows–

'Any marriage solemnized at the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5.

Thus a marriage will be void *ab initio*–

i) If any party to marriage has a spouse living at the time of the marriage (Section 5(1);

ii) If the parties are within the degree of prohibited relationship unless the custom or usage governing each of them permits such a marriage (Section 5(iv);

iii) If the parties are 'sapindas' of each other, unless the custom or usage governing each of them permits such a marriage (Section 5(v).

Section 11 is not applicable to marriages solemnized before the commencement of the Hindu Marriage Act, 1955 i.e. before 18th May,1955, though such marriages may be void.

Where a marriage is void, because a person has taken a second wife, his first wife being alive, the first wife cannot petition under Section 11. Under Section 11, only second wife can petition (*Kedar v. Suprana*, 1963 Pat. 311). But the first wife may bring

a declaratory suit under Section 9, C.P.C. read with Section 34, Specific Relief Act, 1963.

Grounds of void marriage: Under Section 11, Hindu Marriage Act, a marriage is void on anyone of the following three grounds [these grounds apply to marriage, solemnized after the commencement of the Act, i.e., after May 18, 1955; to the pre-Act marriages the old Hindu law of nullity applies]:

1. That at the time of the marriage, either party has a spouse living. In other words, a bigamous marriage is void. Such a marriage will be void only if the first marriage is valid. If the first marriage is void, the second marriage will be valid.

2. The parties are sapindas to each other.

3. The parties are within the prohibited degrees of relationship.

On any one of these grounds either party can present a petition for a declaration that the marriage is null and void.

There are two other cases in which a marriage is void. First, if proper ceremonies of marriage have not been performed, and secondly, if a marriage has been performed in violation of the requirement of Section 15 of the Act.

Can the first wife bring an injunction to restrain the husband from taking a second wife? – The Patna High Court (*Umashanker v. Radhadevi*, 1967 Pat. 220; *Trilokchand v.* Om Prakash, 1974 Pat. 335) said that there is no provision in the Hindu Marriage Act under which a wife, apprehending her husband's taking a second wife, can apply to obtain an injunction restraining him from doing so. She cannot do so under Section 11 or Section 17, or any other provision of the Act. But, it seems, she can file a suit for perpetual injunction restraining the husband from contracting a second marriage, under Section 9, C.P.C. read with Section 38, Specific Relief Act, 1963 The Mysore High Court took this view in *Shankarappa v. Basasmura* (1964 Mys. 247) Iyer, J. said that there was nothing expressly or impliedly in the Hindu Marriage Act. But the first wife has no remedy under the Hindu Marriage Act. In our submission, she may sue her

husband for divorce on the ground of adultery, as the second marriage is void and his relationship with the second wife is illicit.

However, where a man who had married an already married woman whose marriage was in subsistence, can marry again and his subsequent marriage would be valid because his first marriage was null and void (*M.M.Malhotra v. Union of India*, 2006 S.C. 80).

In the case of praying for a decree of nullity of a marriage, the proof of claim by the husband of sapinda relationship had fallen for consideration in *Arun Laxmanrao Navalkar v. Meena Arun Navalkar* (AIR 2006 Bom. 342.

In *M.M.Malhotra v. Union of India & Others* (AIR 2006 SC 80 = 2005 (8) SCC 351 = 2005 (7) Supreme 111), where the husband married a woman during subsistence of her first marriage, such marriage being null and void, his subsequent marriage with another woman will not fall under plural marriage.

In *Harmohan v Kamla Kumari* (AIR 1979 Ori. 51) it was laid down that a third person could also file a civil suit for declaration that a marriage between two persons was void and ineffective if it adversely affected his legal rights. This view has been reaffirmed in the case of *Surjeet Singh v. Mahendra Pal Singh* (AIR 1988 P & H 156). In this way the wife of first marriage can file a suit for a relief that her husband's second marriage be declared null and void. This kind of suit will be only under the Specific Relief Act, 1963.

Section 11 specifically enables either party to the marriage to have it declared null and void by a decree of nullity against the other party. The Section does not confine the right to present a petition there under to the aggrieved party alone. On the other hand, it expressly confers the right to sue on either party to marriage which contravenes any of the conditions of Clauses (i), (iv) and (v) of Section 5.

No wife can apply for injunction restraining her husband to remarry, because such a provision has not been made either in Section 11 or in Section 17. But in *Uma Shanker v. Radha Devi* (AIR

1967 Pat. 220) the Patna High Court rules that the first wife could obtain perpetual injunction to prevent second marriage of her husband under Sectioin 9 of the Civil Procedure Code and Section 54 of the Specific Relief Act. The Mysore High Court has confirmed this view in *Shankerayya v. Vasumura* (AIR 1964 Mys. 247).

The parties to void marriage could in disregard of such marriage, contract another valid marriage but in the case of voidable marriages it could not be done without first getting such a marriage declared null and void (*Krishna v. Tulsa*, AIR 1972 P & H 305).

In void marriage there is no need of court's decree for getting the decree of nullity (*Leela v. Laxmi*, 1968 All. LJ 683). When the court grants a decree it merely declares the marriage null and void. Either party to marriage could file a petition to this effect. The Punjab High Court in *Krishnan Devi v. Tulsa* (1972 Pun. AIR 305) held that a party to void marriage could file a petition under Section 11 for the declaration of its nullity even after the death of the other party. But the Law Commission has criticized this view and observed that section is not meant for granting legitimacy to the offsprings of the marriage but aims at providing relief to the parties of such marriage.

A void marriage is void *ab initio* and *ipso facto*. Such marriages do not constitute a marriage in the eyes of law and hence a declaration of nullity from the court is not required. In a voidable marriage if the second marriage of either party thereto takes place without first seeking from the court a decree for nullity as such, the said marriage would not be valid and the concerned party would be liable for punishment.

Effects or Legal Consequences of Void Marriage

Legitimacy of Children: Under the general law, the children of a marriage which is void ab initio (void ipso jure) are illegitimate and are not entitled to any of the rights conferred by the law on a legitimate child. However, Section 16 of the Act clearly lays down that the children conceived of such a void marriage are to be deemed to be legitimate, even if a decree of nullity has been passed declaring the marriage to be null and void.

Position of Women: Under Hindu Law, the effects of a void marriage was most unfair to a woman. She could not remarry (except after the passing of the Hindu Widow Remarriage Act, 1856). As far as the status of the women is concerned, the Act has provided in Sections 24 and 25 for the maintenance of the woman during the time he or she does not marry.

A petition for declaring a void marriage a nullity may be presented by either party to a marriage to any District Court as defined in clause (b) of Section 3 of the Act within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together such an application would require a Court fee in accordance with the provisions of Art. 1 of the Second Schedule of the Court Fees Act, 1870 such fees may be specially prescribed. It will be subject to appeal as any other decree under the Act.

The parties under void marriage have no status of husband and wife. It does not give rise to mutual rights and obligations between the parties. If one of them or both of them take another spouse, the offence of bigamy will not be committed. The wife under void marriage cannot file a suit for defamation against a person, who calls her as concubine.

Further a void marriage confers no legitimacy and hence the children of the void marriage are called illegitimate children. However, this rule is subject to the provisions under Sec. 16 of the Act, which lays down the provisions relating to legitimacy of children under void and voidable marriages.

B. Voidable Marriage (Section 12) (Annulment of Marriage)

Meaning: A 'voidable marriage' is "one, which can be avoided at the option of one of the parties to the marriage. It remains valid for all practical purposes until and unless its validity is questioned.

Section 12 of the Hindu Marriage Act, 1955 deals with 'Voidable marriage'. It runs as follows:

1. Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

a) That the marriage has not been consummated owing to the importance of the respondent; or

b) That the marriage is in contravention of the condition specified in clause (ii) of Section 5 (i.e. if either party suffers from unsoundness of mind at the time of the marriage); or

c) That the consent of the petitioner or where the consent of the guardian in marriage of the petitioner was required, [under Section 5, as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978], the consent of such guardian was obtained by force or by fraud as to the nature of ceremony or as to any material fact or circumstance concerning the respondent; or

d) That the respondent was, at the time of the marriage, pregnant by some person other than the petitioner.

2. Notwithstanding anything contained in sub-section (1), no petition for annulling marriage:

a) On the ground specified in clause (c) of sub-section (1), shall be entertained if:

i) The petition is presented more than one year after the force had ceased to operate or as the case may be, the fraud had been discovered, or

ii) The petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied:

i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

One of the parties to the marriage (i.e. the aggrieved) can avoid/ repudiate the marriage by filing a petition for annulment of marriage under any one of the following grounds:

a) Impotency;

b) Unsoundness of mind;

c) Use of force or fraud to obtain consent; and

d) Pregnancy by some other at the time of the marriage.

a) Impotency: It means "inability to have conjugal intercourse or incapacity to consummate the marriage". 'Consummation' means "ordinary and complete intercourse". Mere penetration is sufficient to constitute consummation. Impotency due to physical or mental condition makes consummation impossible. Relevant cases on the point are:

Before the Marriage Laws (Amendment) Act, 1976, it was necessary to prove that the respondent was impotent at the time of marriage and continued to be so until the institution of the proceedings. But after the Amendment Act, 1976, if the marriage is subsequently capable of consummation, be it due to surgical operation or otherwise, no decree for annulment of marriage can be granted (*Rajendra Prasad v. Rashmi Kant C. Shah,* AIR 1970 Guj. 43).

In *Moina v. Amardeep* (AIR 1976 Del. 399), Delhi High Court held that under Clause (a) of Section 12 (1), the petitioner would

be entitled to a decree of nullity of marriage if the marriage was not consummated due to the impotence of the respondent spouse. Consummation means ordinary and complete sexual intercourse.

In an earlier case *Mrs. Rita Nijhawan v. Sri Bal Krishan Nijhawan* (AIR 1973 Delhi 200), the Delhi High Court held that the impotency is the lack of ability to perform full and complete sexual intercourse. Imperfect and partial intercourse would not amount to consummation of marriage and if the husband was incapable of performing the sexual intercourse fully in the eyes of law, he would be deemed to be impotent. Where husband is found unable to perform sexual act because of inherent sexual weakness and debility, delay in the circumstances of filing the petition is no bar to grant relief.

Laxmi Devi v. Babulal, AIR 1973 Raj. 89 — The husband could not consummate since the wife did not have vagina. Her vagina was reconstructed by a surgical operation. Though sexual intercourse could be possible, the Court granted the decree of nullity under Section 12.

Shewanti v. Baburao, AIR 1971 MP 168 — In this case, it was held that incapacity owing to congenital deformities to beget children would not amount to impotency (she can actively participate in sexual intercourse, but cannot beget children).

A.P. High Court awarded the decree of nullity under Section 12 on the ground of impotency in the case of:

Padmavathi v. Ravi Kumar Varma, 1987 (2) ALT 355 — In this case, both the parties on first night agreed not to have sex for six months i.e. till the date of P.G Entrance in Medicine. The marriage could not be consummated due to refusal by wife. She stated that the marriage was performed without her consent and she has an aversion for sexual life. The Court granted the decree under Section 12.

b) Unsoundness of Mind: Soundness of mind is one of the conditions for a valid marriage under Section 5 of the Act. A marriage contrary to this rule is voidable in India. But, it is void in England.

The marriage can also be annulled where the marriage was in contravention of Section 5(ii) of the Act, which lays down that neither party should suffer from unsoundness of mind at the time of marriage. Under English Law a person of unsound mind is not capable of giving consent and marriage of such a person is void *ab initio*. But the rule of Hindu Law in this respect is different. Marriage of such a person is not void, it is voidable under Hindu Law.

Now, after the amendments made by the Marriage Laws (Amendment) Act, 1976, Section 5(ii) of the Act provides the following three circumstances of unsoundness where either party at the time of the marriage:

i) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

ii) Though capable of giving a valid consent, has been suffering from mental disorder of such kind or such an extent as to be unfit for marriage and the procreation of children; or

iii) Has been subject to recurrent attacks of insanity or epilepsy.

In *Alka Sharma v. Abhinesh Chandra Sharma* (AIR 1991 M.P. 205), the Madhya Pradesh High Court held that even schizophrenic state of mind would constitute a ground of mental disorder of such a nature which would be sufficient for granting a decree of nullity under this section. In this case the wife was found so cold, frigid and nervous on first night of marriage that no consummation could take place. She was unable to handle domestic appliances and she also urinated in presence of all family members. It was held that the wife suffered from schizophrenia and the husband was entitled to decree of nullity of marriage.

Section 12(1)(b) says that any marriage shall be voidable and may be annulled if the marriage is in contravention of the condition specified in clause (ii) of Section 5. On a plain reading of the said provision it is manifest that the conditions prescribed in that section, if established, disentitles the party to a valid marriage. The marriage

is not *per se* void but voidable under the clause [*R.Lakshmi Narayana v. Santhi,* 2001 (45) ALR 515 (SC)].

c) Consent obtained by Force or Fraud: A marriage to be valid, the parties must have given their consent freely. If the consent is obtained by force or fraud, it is voidable.

The expression 'force' has not been defined in the Act. This expression has been given a wide connotation in the context of marriage. It means not only the actual use of force, but threat to use force also. If the consent has been induced or compelled as a result of an apprehension of injury threatened or inflicted, it would be regarded to have been obtained by force. In *Rice v. Rice* (72 L.T. 22) a woman was forced to marry a man who showed a pistol threatening to blow out her brain, it was held that the consent was obtained by force.

The word 'fraud' in matrimonial law has a technical meaning. It does not include cases of misrepresentation or active concealment even of a material facts including consent of a party. Where the wife knew that she was suffering from venereal disease and she concealed the same from the husband the court did not hold it to be 'fraud' within the meaning of Section 12(1)(c) making the marriage voidable and the husband could not obtain the decree for annulment of marriage [*Madhusudan v. Smt. Chandrika,* AIR 1975 M.P. 174].

In *Nand Kishore v. Smt. Munni Bai* (AIR 1979 MP 45) the Madhya Pradesh High Court has held that the terms force and fraud mean those conditions in which there is absence of real consent. The term fraud has been used in the sense which lacks the element of consent and there is an intention to defraud. Here it is not to be understood in that sense in which it has been used in Section 17 of the Indian Contract Act.

Babai Panmato v. R.A. Singh, AIR 1968 Pat. 190 — An 18 year old woman got married to a man of 60. She was under the belief that he was about 25 years old, as she did not see him earlier. The Court granted the decree under Section 12 since her consent was obtained by fraud.

iv) Pregnancy at the time of marriage: If the wife is pregnant by some other at the time of the marriage, the husband can file a petition for decree of nullity of his marriage. To get decree, he has to satisfy the following conditions:

i) He was ignorant of the fact;

ii). Proceedings have been instituted within one year of the marriage;

iii) Marital intercourse with the consent of the petitioner has not taken place.

Imputation of unchastity is a serious matter. Hence, the burden of proving is on the part of the husband.

In *Mahendra v. Sushila Bai* (AIR 1965 SC 364), the Supreme Court held that where wife admitted her pregnancy from before the solemnization of marriage, when the husband had not met her, the case would be covered under Section 12(1)(d) and the husband would be entitled to get a decree of nullity. In the above case the baby was born to Sushila after 171 days from the date of marriage. The child was a fully developed healthy child. There was no evidence of their meeting before the marriage. Hence the husband was held entitled to the decree.

Distinction between Void and Voidable Marriages

Void Marriage	Voidable Marriage
1. Marriage does not exist in the eye of law.	1. Marriage exists and continues to be valid unless it is challenged under Section 12.
2. The Court simply passes the decree of nullity since the marriage has no existence at all.	2. The Court passes the decree after taking into account necessary conditions.
3. Parties can remarry without decree of nullity from the Court.	3. Parties cannot do so.

4. Wife cannot claim maintenance under Sec. 125 Cr.P.C.	4. Wife can claim maintenance.
5. Void marriage is void ab initio.	5. A voidable marriage is regarded as valid until the competent Court annuls it.
6. Parties to a void marriage are criminally liable.	6. Parties to voidable marriage are not laid down with penalty.
7. In void marriages, not only first wife but a third party who is affected can bring a suit in Civil Court for declaring such marriage void.	7. In voidable marriages, only the parties have right to apply for annulment of marriage.

4. DIVORCE (SECTION 13)

Meaning: Divorce is a process by which the marriage is dissolved (comes to an end). After dissolution of the marriage (Divorce), the parties revert to their unmarried status and are free to marry again. Section 13 of the Hindu Marriage Act, 1955 deals with Divorce. According to Section 13 of the Act, either of the parties to the marriage can file a petition in the district court praying dissolution of the marriage. The Court, if satisfied with the grounds as specified under Section 13, may grant the decree of divorce. However, no petition for divorce can be filed within one year of the marriage (Section 14). Section 13 runs as follows:

1. Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party:

i) has, after the solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation: In this clause:

a) the expression 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

b) the expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not, it requires or is susceptible to medical treatment; or

iv) Omitted

v) has been suffering from venereal disease in a communicable form; or

vi) has renounced the world by entering any religious order; or

vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it; had that party been alive.

Explanation:— In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the

other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

[1-A Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground.

a. that there has been no resumption of cohabitation as between the parties to the marriage for a period of (one year) or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

b that there has been no restitution of conjugal rights as between the parties to the marriage for a period of (one year) or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

2. A wife may also present a petition for a dissolution of her marriage by a decree of divorce on the ground:

i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner;

ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy; or bestiality; or

iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), (or under the corresponding Section 488 of the Code of Criminal Procedure, 1998 (5 of 1898); a decree or order, as the case may be, has been passed against the

husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation: This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

Under Hindu Custom, marriage is considered as sacred and they have this relation by the blessings of the God. They believed the concept of 'marriages are made in heaven'. Hindus considered the separation of couple as a sin and hence the question of living separately did not arise in olden days. Once married, the tie lasts till the end of life.

Divorce means putting an end to the marriage by dissolution of marital relations. The parties can no longer be husband and wife. Divorce was unknown to the old textual Hindu Law of marriage. Manu declared that a wife cannot be separated from her husband either by sale or by abandonment, because marital tie could not be severed under any circumstances whatsoever. Manu did not approve of the dissolution of marriage in any conditions.

Before enactment of the Hindu Marriage Act, 1955 there were Acts in some of the States providing for divorce in certain circumstances. Some of these viz. the Bombay Hindu Divorce Act (22 of 1947), the Madras Hindu (Bigamy, Prevention and Divorce) Act (6 of 1949) and the Saurashtra Hindu Divorce Act (30 of 1952) were repealed by Section 30 of the Hindu Marriage Act, 1955.

Changes introduced in the law of divorce by the Marriage Laws (Amendment) Act, 1976: Following main changes have been introduced by this Act.

i) The ground of adultery has been made simple and now a single act of adultery may constitute a sufficient ground for divorce (Section 13(1)(i).

ii) Cruelty and desertion, which were the grounds of judicial separation originally, have been made the grounds for divorce (Section 13(1)(i-a) and (i-b).

iii) The minimum period prescribed under the other grounds like venereal diseases, etc., has been omitted in order to facilitate divorce without inordinate delay (Section 13(i), and (v).

iv) The court has been given power to exercise its discretion, in petitions of divorce, to grant an alternative relief under certain circumstances (Section 13-A).

v) A vital change has been made by providing divorce by mutual consent of the parties. Thus, by this amendment, the sacramental character of a Hindu marriage has been affected in a big way. The parties can get divorce by an agreement between them (Section 13-B).

vi) The parties can, now, obtain divorce by presenting a petition after one year of their marriage.

The petition for divorce can be filed by either of the parties to the marriage under any one of the following grounds:

i) Adultery;

ii) Cruelty;

iii) Desertion;

iv) Conversion (to other religion);

v) Insanity;

vi) Venereal Disease;

vii) Renunciation of World;

viii) Unheard for 7 years;

ix) After decree of Judicial separation;

x) After decree for restitution of conjugal rights.

Grounds available to wife alone are: In addition to the above, the following grounds are available to a wife to file a petition for divorce.

i) Bigamy;

ii) Sexual Offences;

iii) Decree of Order awarding maintenance;

iv) Repudiation of the marriage.

i) Adultery: Adultery is the consensual sexual intercourse between a married person with another (of opposite sex) other than his/her spouse during the subsistence of the marriage. After the amendment Act of 1976, single act of adultery is sufficient (before the amendment, living in adultery). The burden of proof is on the part of the petitioner. But it is very difficult to prove adultery and circumstantial evidence is accepted. One of the essential elements of adultery is sexual intercourse. Mere attempt at sexual intercourse will not amount to adultery. Some penetration, however brief it may be, amounts to adultery. Since adultery is a serious offence, the Court must be satisfied beyond all reasonable doubts.

Definition of Adultery: Adultery may be defined as "Consensual

sexual intercourse between a married person and a person of the opposite sex; not the other spouse, during the subsistence of the marriage". According to Section 497 IPC, it is an offence. Adultery can be committed by a man, not by a woman. The sexual intercourse must have been committed with the consent of the woman, who is the wife of another man. The criminal action is filed against the man (adulterer) only, not against the woman (even as an abettor). In Matrimonial Law also, it is an offence. It is a ground against adulterer only for a matrimonial relief of Judicial separation or Divorce. To invoke matrimonial relief on the ground of adultery, the marriage must be valid and subsisting at the time of filing the petition. Sexual intercourse with the respondent, when he/she is unconscious under influence of drug or liquor does not amount to adultery.

Subbarama Reddiar vs. Saraswati, AIR 1967, Mad.85:— In this case, husband returned home late and found his wife with unrelated person in the bedroom. Madras High Court held that adultery may be inferred unless the act can be explained by some innocent explantation.

Close movements (Jokes, Accompanying in Cinema Hall etc.) do not constitute adultery (*Champa Gowri vs. Jamna Das* 1971 AIR 230).

Mere love letters to wife by other person would not amount to adultery (*Chandramohini vs. Avinash,* AIR 1967 SC 581).

Chirutha Kutty vs. Subramanian, AIR 1987 Ker.:— The wife became pregnant despite family planning operation (Vasectomy) by the husband. The Court did not grant divorce in the absence of the proof that operation was successful and there was no intercourse between them after the Vasectomy operation by the husband.

In *Tribat Singh v. Mst. Bimala Devi* [AIR 1958 J&K 72], the fact was that a married woman had been absenting herself from her house for four to six days at a stretch and had been seen more than once with a total stranger to her husband's family, and no explanation was given by her for having been seen in the company of that stranger at different places, leads to an irresistible conclusion that she had

contracted illicit connection with that man and had been living in adultery with him.

In *Veera Reddi v. Kistamma*, [1969 Mad. 235], the Madras High Court held that the wife was guilty of adultery by observing that despite the disruption of the relation between the spouses, the wife gives birth to a child.

In *Vimlakshmi v. Smt. Sarojini*, [AIR 1991 Kant. 128], where the husband had himself witnessed the act of adultery but filed the petition for divorce on that ground eight years later the Court held that the said delay was fatal to the petition as it would amount to condonation of the wife's fault.

ii) Cruelty: Before 1976 Amendment, Cruelty was a ground for Judicial separation only. Now, it is a ground for both Judicial separation and divorce. "Cruelty" means "such conduct as to cause physical violence of causing bodily hurt or danger to the person of the petitioner".

Definition of Cruelty: It is very difficult to define the expression "Cruelty". In *Russel vs. Russel* (1897) A.C. 395, It is defined as "Conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to reasonable apprehension of such danger".

The concept of cruelty varies from time to time and from society to society depending upon socio economic conditions.

In *Sobha Rani v. Madhukar Reddi* [AIR 1988 SC 121], the Supreme Court observed that the word 'cruelty' has not been defined in the Act, the word is used in Section 13(1)(ia) of the act with reference to human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. After passing Marriage Laws (Amendment) Act, 1976 cruelty has been a ground of divorce. Prior to this Amendment cruelty was a ground for judicial separation except in the State of Uttar Pradesh. Earlier cruelty had to be such which would affect the physical or mental health of other spouse. Section 13(1)(i-a) of the Act now requires that the other party has,

after the solemnization of marriage treated the petitioner with cruelty. It is no more required that cruelty must affect the physical or mental health of the party. Thus it is now sufficient to establish cruelty as a ground of divorce and it has been left to the courts to determine on the facts of each case, whether the conduct amounts to cruelty.

Though the word 'cruelty' has not been defined in the Hindu Marriage Act, 'cruelty' contemplated under clause (i-a) of Section 13(1) neither attracts the old English doctrine of danger, nor the statutory limits embodied in the old Section 10(1)(b) of the Hindu Marriage Act. After the Amendment of 1976, 'cruelty' contemplated by Section 13(1)(i-a) is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent or that it has become impossible for the spouse to live together.

Cruelty complained of must satisfy the conscience of the court to believe that relations between the parties had deteriorated to such an extent due to the conduct of one of the spouses that it has become impossible to live together without agony, torture or distress or that the atmosphere in the house is so surcharged that it is not conducive for the mental or physical health of any of the parties.

In A.*Jyachandra v. Aneel Kaur* (AIR 2005 SCW 163), the Supreme Court has expressed the view about cruelty. The expression 'cruelty' has been issued in relation to human conduct or human behaviour. It is a conduct in relation to or in respect of matrimonial duties and obligations. The cruelty may be mental or physical, intentional or unintentional. If it is a physical, the Court will have no problem in determining it. It is a question of fact and degree, if it is a mental, the problem presents difficulties. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other.

In *Anita Krishna Kumar Kachba v Krishna Kumar Ram Chandra Kachba* (AIR 2003 Bombay 273), the court stated that 'cruelty is a relative term. It varies from person to person, and case to case. The allegation and conduct of one particular type may not amount to cruelty in all the cases. It depends upon the status of

the spouses and the atmosphere in which they live, that has to be understood by seeing neatly the background behind it and effect which is likely to be caused by such allegations and conduct. Cruelty implies and means harassing conduct and of such intensity and persistence, which would make it impossible for the spouse to operate the marriage. Cruelty, though not defined in the Act, is to be determined on the basis of proved facts and circumstances of the case. No fixed formula can be had for cruelty.

In *Dastane v. Dastane,* (AIR 1970 Bom. 312), the following five tests were laid down in determining whether a given conduct amounts to legal cruelty:

i) The alleged acts constituting cruelty should be proved according to the law of evidence;

ii) There should be an apprehension in the petitioner's mind of real injury or harm from such conduct;

iii) The apprehension should be reasonable having regard to the socio-economic and psycho-physical condition of the parties;

iv) The petitioner should not have taken advantage of his position;

v) The petitioner should not by his or her conduct have condoned the acts of cruelty.

Classification of Cruelty: In the Modern law, cruelty may be classified as : (1) Physical Cruelty; and (2) Mental Cruelty.

1. Physical Cruelty: It is is an act of violence by one spouse to another resulting in injury to body, limb or health or causing reasonable apprehension. *Sayal vs. Sarala* 1961 Punj.125 and *Saptimi vs. Jagdish* (1969) 87 C.W.N. 520 are the cases of Physical Cruelty.

Injury to private parts also amounts to physical cruelty. (*Ashok vs. Santosh*) during the intercourse, the wife used to pull flaccid penis of her husband. The Delhi High Court held that it amounted to cruelty.

Some instances of physical Cruelty:

i) Repeated beating.

ii) Burning any limb of body.

iii) Stabbing.

iv) Causing fracture of any organ.

v) Neglect in providing food or starving.

vi) Administering something that injures health.

vii) Keeping in illegal confinement.

viii) Making attempt on life.

2. Mental Cruelty: Mental Cruelty can be defined as that conduct which inflicts such mental pain and suffering as would make it not possible for the party to live with the other. It must be of such a nature that the parties cannot reasonably be expected to live together. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. Mental cruelty includes use of abusive language, causing mental agony etc. *N. Sreepadachandra vs. Vasantha,* 1970 Mys. 232 — is a good illustration on mental cruelty. In this case, the act of wife in abusing and insulting the husband in public was held to be cruelty.

Sobhadevi vs. Bhima, AIR 1976 Ori. 80 — Intemperate and violent behaviour by husband due to heavy drinking was held to be cruelty. Mere drink habit is no cruelty.

Siddagangaiah vs. Lakshamma, AIR 1968 Mys. 115 — It was held in this case that 'imputation of adultery amounts to cruelty'.

In *Suresh Kumar Gulati v. Smt. Suman Gulati,* (AIR 1983 All. 225), the Court has observed that cruelty can be mental, but when one speaks of mental cruelty as distinct from physical cruelty, the idea is to show that while in the case of physical cruelty, harm or injury inflicted is to the body directly, in the case of mental cruelty, the harm or injury caused is through the mind, but nevertheless it is a harm or injury caused to the physical body. The injury when caused to the physical body is something which could be perceived

by the senses but when it is caused mentally, the result of it may appear later on by affecting the health of the person to whom it is caused. Every mental tension cannot amount to infliction of mental cruelty. It must, however, be shown that the injury inflicted through the mind of the petitioner has affected his health, or that the future repetition of that injury is most likely to affect his health.

In *Smt. Satya v. Sri Ram* (AIR 1983 P&H 252), the Court observed that where the husband himself, his sister and his parents were always crazy to have a child in the family but the wife always dashed their hopes by resorting to termination of pregnancy twice, this conduct of the wife amounts to mental cruelty at least, if not physical to her husband and the husband is well within his right to claim the decree of divorce on that ground.

In *Bhagwat vs. Bhagwat*, AIR 1976 Bom. 80 — In the instant case, husband tried to strangulate wife's brother (on one occasion) and younger son (on another occasion). Husband pleaded insanity (that he had no intention to be cruel). It was held that insanity should not bar relief claimed by the wife (on the ground of cruelty).

Some instances of Mental Cruelty to Husband (by the wife):

i) Wife's having undesirable relations with some other person, refusal to discontinue such relation and also threatening the spouse to put an end to his life.

ii) Refusal to cook food for the husband and insulting him in the presence of his friends and relatives.

iii) Charge by the wife and her parents without medical evidence that the husband is suffering from erectile dysfunction i.e. inability to perform sexual intercourse.

iv) Voluntary abortion without the consent of the husband.

v) Birth of an illegitimate child within seven months from the date of marriage.

vi) Making a false complaint to the superior of the husband that he ill-treated her which lowered the husband in the

eyes of his employer and affecting his career and promotional opportunities.

vii) Burning the Doctoral Thesis prepared by her husband who is a lecturer.

viii) Threatening to commit suicide and to involve the husband and his family in criminal cases.

Some instances of Mental Cruelty to wife (by the Husband):

i) Frequent demand for dowry.

ii) Returning home late at night to the house in a drunken condition.

iii) Imputing unchastity to the wife.

iv) False charge against wife that she was not a virgin.

v) Compelling the wife to adopt the life of a prostitute.

vi) Marry another woman.

vii) Imposing a condition by the husband on the educated wife not to do a service.

viii) Ill-treatment of children.

iii) Desertion: Before the amendment of 1976, desertion was a ground for judicial separation only. Now, it is a ground for both the judicial separation and divorce. Desertion means "leaving/ abandoning the spouse by the other spouse without reasonable cause." The spouse who deserts is called 'deserting spouse' and the other, who is deserted is called 'deserted spouse'. Desertion is "a withdrawal not from a place, but from a state of things".

According to Rayden, 'Desertion is the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse, but the physical act of departure by one person does not necessarily make that spouse the deserting party.'

Eg.: If the wife leaves the husband (matrimonial home) for parental home and remains there, the wife is called 'deserting spouse' and the husband is called 'deserted spouse'. The period of desertion must be not less than two years preceding the date of presentation of petition.

To constitute desertion, the following two conditions must be satisfied:

i) Factum of Separation (intention to live separately); and

ii) Intention to bring cohabitation to an end permanently.

The nature of desertion as a matrimonial offence was elaborately expounded by Sinha J. in the case of:

The burden of proof in case of desertion is always on the petitioner. He or she must show that it was without any reasonable excuse and that it existed throughout the period at least two years. It is for the petitioner to make specific allegation in the petition that the respondent has deserted without any reasonable or probable cause and where he does not allege this, the petitioner to succeed, he has to allege that the deserting spouse has deserted without any reasonable and probable cause, he would have to give evidence to prove the said allegation.

Bipin Chandra vs. Prabhavathi, AIR 1957 SC 176 — In this case, the wife was living in her father in law's house with the husband and his parents and two unmarried sisters. After some time, a son was born to them. The husband went abroad (England) and she developed illicit contact with a family friend. The husband, after returning from England questioned the wife about her illicit contact. She denied and left for parental home to attend her cousin's marriage. The husband sent lawyer notice charging her with illicit contact and asked her to send back the child. She expressed her willingness to come back. But the husband sent a telegram not to come back. The Supreme Court dismissed the petition on the ground that she was not in desertion.

Without Reasonable Cause: To constitute desertion, the separation must be without reasonable cause. The following have been held to constitute sufficient grounds for desertion:

i) Confession of adultery by the wife.

ii) Habitual drunkenness of wife.

iii) Persistence in the false charge of unnatural offence having been committed by the husband.

iv) Unreasonable and persistent refusal by the wife to consummate the marriage; and

v) Wife permitting indecent liberties taken by others with her.

Cropala vs. Pushpadevi, AIR 1982 Kant. 329 — In this case, the husband asked/forced his wife to live away because of the cruelty of his step mother. Held that, it would not amount to desertion.

Without consent or wish of the deserted spouse: If the deserting spouse has left the matrimonial home without the consent or wish of the deserted spouse, it would amount to desertion.

The relevant case on this point is *Perumal Naiker vs. Sitalakshmi,* AIR 1956 Mad. 415.

In view of the above, desertion requires four elements, namely: (i) factum of separation; (ii) intention; (iii) without reasonable cause; and (iv) without consent or wish of the deserted spouse. (P.S.:—Question may be asked independently on desertion as a ground for divorce).

iv) Conversion: Conversion means 'Change of religion'. It is a process by which a person gets converted from one religion to another. *Eg.:* If a Hindu took Christianity, he/she is ceased to be a Hindu. It is a good ground to the other spouse to take divorce.

Under clause (ii) of Section 13(1) of the Hindu Marriage Act, if the respondent has ceased to be a Hindu by conversion to another religion, divorce may be obtained. Under the clause two conditions must be satisfied

i) Respondent has ceased to be a Hindu, and

ii) He has converted to another religion.

Section 13(1)(vi), Hindu Marriage Act: *Ceased to be a Hindu* – A person does not ceased to be a Hindu merely because he declares that he has no faith in his religion. A person will not cease to be a Hindu if he does not practice his religion, or does not have faith in his religion or renounces his religion or leads an unorthodox life, so much so even he eats beef and insults all Hindu gods and goddesses. He will also not cease to be a Hindu even if he expresses his faith in another religion and even starts practicing another religion. Such a person will continue to be a Hindu. Thus, ceasing to be a Hindu is hardly material except in the context of conversion.

The marriage which can be dissolved on this ground is a marriage solemnized under the provisions of this Act or according to old Hindu law. Marriage solemnized under special statutes cannot be dissolved and is not covered by the provisions of this Section (*Chandra Sekhar v. Kuldan velu*, AIR 1963 SC 185).

v) Insanity (Unsound mind): Insanity or unsoundness of mind or mental disorder is a ground for both judicial separation and divorce. 'Mental unsoundness' implies some unusual feature of the mind as has tended to make it different from the normal and has in fact impaired a man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in a matter of his own. Before 1976 Amendment, the respondent must have been incurably of unsound mind for a period of 2 years for Judicial separation, and 3 years for divorce preceding the date of the petition. The 1976 Amendment changed the position. Now, the respondent has been incurably of unsound mind or has been suffering from mental disorder that the petitioner cannot reasonably be expected to live with the respondent (Eg.:— epilepsy).

In *Ram Narayan v. Rameshwari* (1989 SC 149), the Supreme Court said that in schizophrenic mental disorder, the petitioner should prove not merely the said mental disorder, but should also establish that on that account the petitioner could not reasonably be expected to live with the respondent.

In *Ram Narain Gupta v. Smt. Rameshwari Gupta* (AIR 1988 SC 2260), the Supreme Court elaborately described about the degree

of mental disorder which will enable an aggrieved party to a marriage to obtain a decree of divorce. The court held that the context in which the idea of unsoundness of 'mind' and 'mental disorder' occur in the section as grounds for dissolution of a marriage; require the assessment of the degree of the 'mental disorder'. Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognized as grounds for decree of divorce. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage, few marriages would, indeed, survive in law. 'Schizophrenia' it is true is said to be difficult mental affliction. Not all schizophrenias are characterized by the same intensity of the disease. The mere branding a person as schizophrenic therefore will not suffice for purpose of Section 13(1)(iii).

vi) Venereal Disease: Earlier, (i.e. before the Amendment of 1976), to get the decree of divorce on the ground of venereal disease, the respondent had been suffering from it for a period of not less than 3 years. Now it is sufficient if the respondent is suffering from the disease at the time of filing the petition. If it is attacked to the respondent from the petitioner, the petitioner is not entitled to the relief. Syphilis, gonorrhoea are mentioned as venereal diseases under the English Venereal Diseases Act, 1917. The present section requires that the disease must be in a communicable form. The venereal diseases are only such diseases which are communicated by sexual intercourse. The petitioner may not be forced to subject himself or herself for medical examination but on his or her refusal the court may draw an inference against him and may refuse to grant the relief under Section 23 of the Act.

vii) Renunciation of world: The petitioner can seek divorce, if the respondent has renounced the world by entering any religious

order. The renunciation requires relinquishment of all property and worldly affairs. Hindus recognize Sanyasa Ashrama as the last of the four ashrams into which the life of a Hindu is organized. According to Hindu religion, every Hindu is required to enter the last ashrama in his old age; entering into this ashrama amounts to civil death. One of the ceremonies that is performed before one enters this ashrama is one's own funeral rites.

In *Somasundaram v. Vaithilinga* (AIR 1981 Mad 794), the Court has held that a Sudra cannot enter the order of Sanyasi. Hence, unless a usage to the contrary is established, a Sudra is not supposed to renounce the world by entering any religious order.

In *Shital Das v. Sita Ram,* (AIR 1954 SC 606), the Supreme Court has observed that renunciation of world affairs followed by entrance into a religious order generally operates as a civil death and it is necessary that all the required ceremonies for entering the religious sect or order are proved satisfactorily.

viii) Unheard for seven years: If the whereabouts of one spouse are unknown for a period of seven years, the other spouse can presume his/her death and can institute a petition for dissolution of the marriage.

Under Section 108, Evidence Act a person is presumed to be dead if he is not heard of as alive for seven years or more by those who would have normally heard from him or about him had he been alive. The burden of proving that such a person is not dead but alive lies on him who affirms it. The question that becomes important in matrimonial law is: can the other spouse on the basis of presumption of death assume that he or she has become a widower or widow and therefore the marriage stands dissolved? And, on this assumption, can he or

she contract a second marriage? One can do so only at his own risk. After sometime if the missing spouse re-appears, can the validity of second marriage be maintained? The answer is in the negative. Not only will the second marriage not be valid, the spouse can also be prosecuted for bigamy. To avoid the risk of missing spouse re-appearing rendering the second marriage void, clause (vii) of Section 13(1) provides that a petitioner may obtain a decree of dissolution of marriage on this ground. Once the marriage is dissolved, the petitioner is free to marry again and even if the missing spouse returns the next day of the passing of the decree or much before the second wedding, he can do nothing. It may be noted that if the second marriage is performed on the basis of presumption of death without getting a decree of divorce, no person other than the missing spouse can question the validity of the second marriage (*Nirmoo v. Nikkaram*, AIR 1968 Delhi 260).

This has been a separate ground for divorce under English law, and has been retained as such under the Matrimonial Causes Act, 1973, Section 19, though wordings are somewhat different.

ix) After decree of judicial separation: If the disputing spouses do not reconcile/resume matrimonial life within one year from the date of the decree under Section 10 (Judicial Separation), either of the spouses can file a petition for divorce under Section 13. (Before the 1976 Amendment the period was two years).

x) After the decree for restitution of conjugal rights: If the parties do not rejoin/resume matrimonial home within one year or upwards after obtaining the decree for Restitution of Conjugal Rights, either of the parties can resort to file a petition for divorce

under Section 13. (Before the 1976 Amendment, only the petitioner, who got the decree under Section 9 could file a petition, not the respondent).

In *A.V.Janardhana Rao v. MAruna Kumari,*(AIR 2000 AP 127), the fact of the case is that there was no resumption of cohabitation between parties for a period of one year after passing of a decree for restitution of conjugal rights. The husband moved a petition for divorce under Section 13(1-A)(ii) of the Hindu Marriage Act. The Court observed that both parties were not willing to reach a compromise for leading marital life jointly. The Court decreed for divorce.

Grounds available to wife alone: In addition to the above, following are some more grounds available to the wife, to get divorce under Section 13.

i) Bigamy: Section 13(2)(i) of the Hindu Marriage Act, 1955 provides that in the case of the marriage of the wife solemnized before the commencement of the Act, (i.e. before 18th May, 1955) the wife can apply for divorce on the ground that the husband had married again before such commencement of the Act. Monogamy means "a man or woman must not have more than one spouse living". If the husband, whose wife is alive, gets married again, it amounts to bigamy and is guilty of an offence under Section 494, I.P.C. To file a petition on the ground of bigamy, the first and second wife must be alive at the time of filing the petition under Section 13 by the first wife. The second wife cannot file a petition under Section 13, since her marriage itself was void (Section 11).

In *Mandul Nagana v. Lakshmi Bai,* (AIR 1963 AP 82), it was observed that where the wife presents a petition under Section 13(2) of the Act for divorce on the ground that her husband had married again the fact that the husband has divorced the second wife subsequent to the filing of the petitioner is no ground for dismissing the petition. The crucial date is the date of the presentation of the petition and not the date of the decree. The subsequent events should not enter into the passing of the judicial verdict in deciding the petition.

ii) Sexual Offences: A wife can file a petition under Section 13 if her husband is guilty of certain sex offences viz. rape, sodomy, bestiality etc. Section 13(2)(ii) of the Hindu Marriage Act, 1955 enables the wife to obtain divorce where the husband has since the solemnization of the marriage been guilty of rape, sodomy or bestiality. The expressions 'rape' or 'sodomy' have been defined in Sections 375 and 377 of the Penal Code. Section 375 defines 'rape' while Section 377 'unnatural offences' (i.e. sodomy or bestiality, etc.).

The word 'rape' means having sexual intercourse with a woman against her will or without her consent or by force, or with consent where the man knew that he is not her husband and she believes herself to be lawfully married, or with or without her consent where she was under 16 years of age (Section 375 of IPC). But the Hindu Marriage Act does not define the expression 'rape'.

'Sodomy' means copulation between male persons. It is an unnatural sexual act and was made punishable under Section 377 of IPC, when such an act was with any man, woman or animal. But it may not be strictly called sodomy if the act is with a woman or an animal.

Bestiality means sexual union by a human being against the order of nature with an animal. In the Oxford Dictionary 'bestiality' is given the meaning 'of or like a beast brutish, barbarous, depraved, lustful or obscene.' The word 'bestiality' means beastly character or conduct; also unnatural connection with a beast, also brutish or irrational character or conduct and degraded conduct.

It would seem therefore that where a married man is guilty of any of the above conduct, the woman is entitled to have the marriage dissolved by a decree of divorce under the provisions of this clause of sub-section (2) of Section 13 of the Act.

iii) After decree for Maintenance: Under Clause (iii) of Section 13(2) of the Hindu Marriage Act, where a decree or order has been passed against the husband awarding maintenance to the wife notwithstanding that (i) she was living apart and that (ii) since the passing of such decree or order, cohabitation between the parties

has not been resumed for one year or upward, a wife on this ground, may present a petition for the dissolution of her marriage by a decree of divorce. The wife, who has been granted the decree for maintenance under Section 18 of the Hindu Adoptions & Maintenance Act, 1956, or under Section 125, Cr.P.C. or under Sections 24 & 25 of Hindu Marriage Act, can file a petition under Section 13 for divorce if the cohabitation between the parties has not taken place even after the elapse of one year.

Under Section 13(2)(iii) of the Act the essential conditions for filing a divorce petition are:

i) The Petitioner should be a wife.

ii) There should be a decree of maintenance passed under Section 18 of the Hindu Adoption and Maintenance Act, 1956 or under Section 125 of the Code of Criminal Procedure, 1973.

iii) Non-resumption of cohabitation between the husband and wife for one year or more after passing of a decree of maintenance under the aforesaid Acts.

iv) Repudiation of Marriage: This provision was enshrined in the Act under the 1976 Amendment. Where a marriage was solemnized before or after the Act, if the woman was below the age of 15 years, she can apply for divorce before attaining the age of 18 years (whether the marriage was consummated or not). It is just and reasonable if she seeks this benefit even after attaining 18 years, if the marriage is not consummated. According to 1978 Amendment any marriage with a girl below 18 years is voidable even after attaining 18 years of age.

In *Bathula Ilahi v. Bathula Devamma*, (AIR 1981 AP 74), the court granted the decree after the wife had attained the age of 18 years. The wife in this case had repudiated the marriage before attaining the age of 15 years because after living with the husband for some time she realized that it would be dangerous to live with him any more. She came to learn later on about the passing of Marriage Laws (Amendment) Act, 1976, which entitled her to bring present

petition. The Court held that even though the petition has been presented after passing of the age of 18 years it would be allowed still in the wake of reasonable explanation for the delay. Where the wife was married before attaining the age of fifteen years but she repudiated the marriage after attaining the age of fifteen years but before attaining the age of 18 years and all this happened before the Amendment Act of 1976 came into force, the court held that even after 1976 that episode can be taken into consideration and divorce can be granted to the wife.

In *Indira v. Balbir Singh,* (1995 (2) HLR 102 (P&H), it was observed that presenting of the petition by the appellant in itself amounts to repudiation of marriage particularly when no particular form for repudiation of marriage is provided statutorily under the statute or any rules framed thereunder.

In *Kamlesh v. Chamel Singh,* (1986 (2) HLR 464 (P&H), the Court has held that it is sufficient if she repudiates the marriage before completion of 18 years and it is not necessary that she should file a petition under Section 13(2)(iv) of the Act before that date. She could file the petition even after that date.

5. DIVORCE BY MUTUAL CONSENT

Section 13-B of the Act deals with 'Divorce by Mutual Consent'. This section was inserted under the Amendment Act of 1976. It means "both the parties agree to dissolve their marriage". In other words, both the wife and husband are willing to get separated by Divorce.

According to Section 13-B(1), such a petition is required to be moved jointly by the parties to marriage on the ground that they have been living separately for a period of one year or more and they have not been able to live together and also that they have agreed that the marriage should be dissolved.

Requisites: The following conditions are to be satisfied for the divorce by mutual consent:

i) Both the spouses should file the petition for divorce jointly;

ii) The parties (spouses) have been living separately for more than one year preceding the date of filing the petition;

iii) They have not been able to live together; and

iv) They mutually agree to dissolve the marriage.

After filing the petition, the parties may withdraw the petition. If not withdrawn, the Court may after 6 months and before 18 months pass a decree for divorce, after hearing the parties.

In *Raj Vinod v. Smt. Durga Devi* (2002 (47) ALR 572) where the parties reached a consensus that they cannot happily live together as husband and wife since their separation was for a substantial period of sixteen years. As a result of the consensus, they decided to present joint divorce petition and the divorce by mutual consent allowed.

Whether one spouse (party) can withdraw?

As stated above, provision was made to withdraw the petition for divorce by mutual consent. Now the question is, whether one party can withdraw the petition? The trial Court answered the question in the affirmative, while the Court of Appeal (Bombay High Court) answered in the negative in the case of:

Jayasree vs. Ramesh, AIR 1984 Bom. 302 — Both the parties filed a petition for divorce under Section 13-B. Subsequently, the husband alone filed an application for withdrawal of the petition. But, the Bombay High Court held that once consent is given it cannot be withdrawn without the consent of the other spouse.

This view was followed by the Punjab and Haryana High Court in *Nachhatar Singh vs. Barcharan Kaur,* AIR 1986 P & H 201.

But, the Rajasthan High Court did not follow this view in *Santosh Kumari vs. Virendra Kumar,* AIR 1986 Raj. 128: and held that any one of the parties to the petition could withdraw the petition till the last day of the 18th March. Paras Diwan, in his book, "Law of Marriage and Divorce" opined that the views of the Bombay and Punjab & Haryana High Courts were correct in view of present social context. Finally in:

Sureshta Devi v. Om Prakash, AIR 1992 SC 1904 — The Supreme Court had settled the above controversy and held that consent given for mutual divorce can be withdrawn unilaterally i.e. by either of the parties/spouses.

However, the court has a discretionary power to grant divorce, if the petition is withdrawn by one spouse as laid down by the Supreme Court in *Ashok Hurra v. Rupa Hurra,* (1977 SC).

In *Chanderkanta v. Hanskumar* (AIR 1989 Del. 73), it was held that one of the parties cannot unilaterally withdraw the consent unless it is proved that the consent was obtained under fraud, coercion or undue influence.

In *Ashok Hurra v. Rupa Bipin Zaveri,* (AIR 1977 SC 1266), the Supreme Court has observed that where wife and husband file divorce petition under Section 13-B (Mutual consent) and one of them withdraws his/her consent thereafter, the Court has the discretionary power to proceed the case and to grant divorce decree if the evidences were in favour of the petitioner by overriding the general principle 'after submission of petition, if any one of the spouses withdraws the consent, the Court will not sanction divorce on the petition before it'.

Distinction between Judicial Separation and Divorce

Judicial Separation	Divorce
1. Section 10 of the Hindu Marriage Act deals with Judicial Separation.	1. Section 13 and 13-B of the Hindu Marriage Act deal with divorce.
2. Conjugal Rights are suspended.	2. Marriage is dissolved.
3. It keeps the marriage marriage.	3. It puts an end to the alive.
4. Parties cannot remarry during this period.	4. Parties are free to remarry after divorce.
5. The object of Judicial separation is to unite the couple.	5. The object of divorce is to live independently (and also to remarry).

CASE COMMENT (PART-C)

Case:— Discuss the facts and the law laid down in:

Sareetha v. Venkata Subbaiah, AIR 1983 AP 356 (N.U., Sept., 1999, Part-C, Q. 16, Marks: 20).

Ans.: Instant case relates/refers to Section 9 of the Hindu Marriage Act, 1955, which provides for a matrimonial relief, the Restitution of Conjugal Rights.

The Constitutional validity of Section 9 of the Hindu Marriage Act, 1955 was challenged in:

T. Sareetha v. T. Venkata Subbaiah, 1983 AP 356—

Facts of the case: Sareetha, a famous film star got married to Venkata Subbaiah, the petitioner in the instant case. After some time, she left for her parental home, Madras. As she was busily engaged in the cine field, she remained there and neglected her husband residing at Nellore. Venkata Subbaiah filed a petition against his wife in the District Court, Nellore under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. The District Court, Nellore granted a decree in favour of the petitioner and directed the respondent (Sareetha) to resume the conjugal society of her husband.

Sareetha did not join the matrimonial home and preferred an appeal before the High Court of Andhra Pradesh. She contended that Section 9 of the Hindu Marriage Act is unconstitutional as it offends Article 21 (Right to life and personal liberty, which includes right to privacy) and Article 14 (Right to Equality) of the Indian Constitution.

Issue Involved: The issue involved in the instant case is — Whether Section 9 of the Hindu Marriage Act is constitutional or unconstitutional?

Constitutional validity of Section 9: Sometimes, a decree in favour of the husband under Section 9 of the Hindu Marriage Act may deprive a wife from the personal liberty and employment of her choice. Such situations are quite obvious in the society. For instance, if a wife is employed in different place, her husband may ask her

to resign and join him. If she refuses to resign, the husband may file a petition and the Court may direct her to join the husband under Section 9. Then, the question is: Whether Section 9 of the Hindu Marriage Act is violative of Arts. 14 and 21 of the Indian Constitution.

In the instant case, on behalf of the wife (Sareetha) it was argued that the right to privacy confers on a woman's right of free choice as to whether, where and how her body is to be used for the procreation of children and also the choice of when and by whom the various parts of her body are to be sensed. This freedom of choice is her right to privacy, which forms part of her right to liberty guaranteed under Art.21 of the Constitution. Further, it was argued that the remedy under Sec.9 violates Article 14 of the Constitution by making the remedy available to both married men and married women, by treating them equals though they are inherently unequal.

Decision/Judgment:— The Andhra Pradesh High Court through Hon'ble Justice P.A Chowdary accepted the above arguments and struck down Section 9, as it violates the wife's right to privacy (by compelling her to have sexual intercourse, probably leading to pregnancy against her will), which is a part of Art.21 of the Constitution. Therefore, the husband's petition was dismissed on the ground that Sec.9 is violative of Arts.14 and 21 of the Constitution.

However, the decision of the A.P. High Court in Sareetha's case was dissented and the constitutionality of Section 9 was upheld by the Delhi High Court in the case of:

Smt. Harvinder Kaur vs. Harmandir Singh. AIR 1984 Del.66:— The husband filed a petition against his wife for restitution of conjugal rights under Sec.9. The respondent (wife) opposed the petition in support of the decision of the A.P. High Court in Sareetha's case. But, the court (Delhi High Court) through Justice Avadh Behari Rohatgi dissented from the decision of A.P. High Court and upheld the constitutionality of Sec.9 and granted a decree for restitution of conjugal rights.

Decision of the Supreme Court: The above conflict as to the constitutional validity of Sec.9 of the Hindu Marriage Act, 1955 was resolved finally, by the Supreme Court in:

Saroj Rani vs. Sudarshan Kumar; AIR 1984 SC 1562:— The Court, favouring the decision of the Delhi High Court (in *Smt. Harvinder Kaur vs. Harmander Singh*), overruled the decision of the A.P. High Court in Sareetha's case and upheld the constitutional validity of Sec.9 of the Hindu Marriage Act.

The Court opined that the leading idea of Section 9 is to preserve the marriage. It was held that the remedy under Sec. 9 of the Hindu Marriage Act is not at all violative of Articles 14 or 21 of the Constitution.

Problem: Susmitha, a famous T.V. anchor of Hyderabad got married to Suresh, a Bank Official at Visakhapatnam. After some time, Susmitha left for Bombay cine field as heroine and remained there with her parents. As she was very busy with her duties, she neglected her husband at Visakhapatnam. Suresh asked his wife to quit the cine field and join him. She refused to do so. Suresh filed a petition against his wife for restitution of conjugal rights - Decide.

Ans: Instant problem refers to (attracts) Section 9 of the Hindu Marriage Act, 1955, which provides for the Restitution of Conjugal Rights.

Section 9: According to Section 9 of the Hindu Marriage Act, 1955, "when either the husband or the wife has, without reasonable excuse, has withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court for restitution of conjugal rights. The Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground, why the application should not be dismissed, may decree restitution of conjugal rights accordingly.

The expression 'Reasonable Excuse' has been inserted under the Amendment Act of 1976. The burden of proving reasonable excuse is on the spouse, who has withdrawn from the society of the other.

Relevant case law: The relevant leading case of the instant problem is — *T. Sareetha vs. T. Venkata Subbaiah*, AIR 1983 AP 356 — Now, write about this case in detail as above and also the

other relevant cases (as above upto *Saroj Rani vs. Sudarshan Kumar.*)

In view of the Supreme Court's decision in *Saroj Rani vs. Sudarshan Kumar,* the decision of the A.P. High Court is no more a law and hence, Sec.9 of the Hindu Marriage Act is not violative of Arts.14 and 21 of the Constitution. Therefore, Suresh, the petitioner in the instant case is entitled to a decree for the restitution of conjugal rights under Sec. 9 of the Hindu Marriage Act.

Case: Discuss the facts and the law laid down in the following case:

Dastane vs. Dastane, AIR 1975 SC 1534 (N.U. Sept. 1999, Part-C, Q.15, Marks: 20).

Ans.: Instant case relates to 'Cruelty', which is a common ground both for Judicial Separation under Sec. 10(i)(b) and Divorce under Section 13(i)(a) of the Hindu Marriage Act, 1955.

Dastane vs. Dastane, AIR 1975 SC 1534:

Facts of the case: Dr. N.G. Dastane, the petitioner in the instant case married S. Dastane in 1956 and 3 children were born to them. The husband filed a petition for annulment of the marriage on the ground of cruelty under Section 10(i)(b) and Section 13(i)(a) of the Hindu Marriage Act, 1955. The allegations against the wife were, she was threatening to put an end to her own life (suicide), to set fire to the house to ruin his family; insulting and abusing him and his parents in the presence of the guests and neighbours, threatening to burn the book written by his father; rubbing chilly powder on the infant child, beating the child suffering from high fever mercilessly etc. The husband proved her trouble making behaviour and indifferent attitude.

Judgment: The Bombay High Court annulled the marriage on the ground of wife's cruelty. On appeal, the Supreme Court reversed the decision of the High Court and dismissed the petition.

The Supreme Court opined that the English decisions on 'Cruelty' may not always be a safe guide. They require danger to life, limb

or health. But, Sec. 10(i)(b) and Sec. 13(1)(a) laid down in a lower requirement namely "reasonable apprehension" that it is harmful or injurious for one spouse to live with the other. This requirement is not satisfied in this case. In this case, the parties continued to cohabit and gave birth to three children.

Principle laid down: The Supreme Court viewed that the conduct of the wife (respondent) amounts to coordination of cruelty. But, the coordination is only a conditional forgiveness. The implied condition is that no further matrimonial offence should be committed. The Supreme Court laid down the following propositions:

1. The fact that the parties are Hindus does not lead to any special assumption. Eg.:— The wife is the oppressed party. The evidence ought to bear a secular examination.

2. A matrimonial offence need not be proved beyond reasonable doubt. (They are required to be proved in Criminal Law).

3. The decision can be based on a preponderance of probabilities. Sec. 25 requires only the standard of proof, which is required in other civil cases.

Problem: 'A' began to live separately from her husband 'B', because the latter was ill-treating her. 'B' sought divorce against 'A' for deserting him — Decide according to Hindu Marriage Act. (S.V.U., Nov. 1999, Part-C, Q.14, Marks: 20).

QUESTIONS AND HOW TO ANSWER

Q) Difference between void and voidable marriage? (A.U. Model Q.P. Part-A, Q.7, and A.U. Dec. 2000, Part-A, Q.2, Marks: 4).

Ans: Write the meaning of void and voidable marriage in brief and then write the differences between the two in brief (Under a table).

Q) Discuss the constitutional validity of the matrimonial relief of restitution of conjugal rights under Hindu Marriage Act. (A.U., Model Q.P. Part-B, Q.1; and A.U. July 2000, Part-B, Q.4, Marks: 18).

Ans: Write in detail about the restitution of conjugal rights with particular reference to *Sareetha's case* and subsequent cases upto Supreme Court's decision in *Sarojini vs. Sudershan Kumar.*

Q) How far 'Cruelty' is a ground for obtaining Divorce? (N.U. April 1999, Part-A, Q.5, Marks: 4).

Ans: Section 13(i)(a) of the Hindu Marriage Act, 1955 deals with 'Cruelty' as a ground for Divorce. Now, write the meaning of Divorce in brief and then write about 'Cruelty' as a ground for divorce.

Q) Discuss the various grounds provided for, under Hindu Marriage Act, 1955 for obtaining Divorce. (N.U. April 1999, Part-B, Q.12, Marks: 18).

Ans: Write the meaning of divorce and then explain the various grounds for divorce in detail. (i.e. explanation in one paragraph and one or two cases in one paragraph against each ground viz., Adultery, Cruelty, Desertion etc.).

Q) When the court may grant decree of Divorce by Mutual Consent. (N.U., Sept. 1999, Part-A, Q. 2, Marks: 4)

Ans: Write in brief about the Divorce by mutual consent.

Q) What is the utility of the decree of judicial separation? (N.U., Sept. 1999, Part-A, Q.3; and A.U., July 2000, Part-A, Q.1 Judicial Separation; and A.U. Nov./Dec. 2000, Part-A, Q.1, Marks 4).

Ans: Section 10 of the Hindu Marriage Act provides for a matrimonial relief, Judicial Separation. Now, write about the meaning of judicial separation in brief and then write about the effects/consequences of the decree of judicial separation.

Q) How far 'Desertion' is a ground for Divorce? (N.U., Sept. 1999, Part-A, Q.6, Marks: 4).

Ans: Section 13(i)(b) of the Hindu Marriage Act, 1955 deals with 'Desertion' as a ground for Divorce. Now, write about desertion with one or two cases in brief.

Q) Consequences of voidable marriage. (S.V.U., Nov. 1999, Part-A, Q. 3, Marks: 4).

Ans: Section 12 of the Hindu Marriage Act, 1955 deals with voidable marriage or annulment of marriage. Now, write the meaning of voidable marriage and then, the consequences/effects of voidable marriage.

Q) Give an account of salient features of divorce by mutual consent under Hindu Marriage Act. (S.V.U., Nov. 1999, Part-B, Q. 13, Marks: 18).

Ans: Write about the meaning of divorce in brief and then write in detail about divorce by mutual consent in detail with case law.

Part - II

The Hindu Adoptions and Maintenance Act, 1956

The Hindu Adoptions and Maintenance Act (hereinafter called the Act) was passed in the year 1956. It came into force on 21st December, 1956 and extends to the whole of India except the State of Jammu and Kashmir and is applicable to Hindus. It deals with:

1. Adoption; and
2. Maintenance

The Act contains 30 Sections; Chapter-II containing 13 Sections (Sections 5 to 17) lays down the provisions relating to "Adoption", while the Chapter-III containing 11 Sections (Sections 18 to 28) lays down the provisions relating to "Maintenance".

Salient Features:

i) This Act may be called the Hindu Adoptions and Maintenance Act, 1956 and it extends to the whole of India except the State of Jammu and Kashmir (Sec.1). The Act came into force on the date when it received the assent of the President i.e. 21-12-1956. The Act has no operation beyond the territories of India.

ii) The Act will apply only to Hindus but the term Hindu has been interpreted in a very wide connotation so as to include Jains, Sikhs and Buddhists (Sec.2).

iii) The Hindu Adoptions and Maintenance Act deals with two subjects, namely adoption and maintenance. Sections 1 to 4 are common to both subjects. Sections 1 to 17 and Section 30 are related to adoption and the remaining sections are related to maintenance under the Act.

iv) Section 3 of the Act defines the terms 'custom and usage', maintenance and minor. Minor means a person who has not completed his or her age of 18 years.

v) Section 4 of the Act repeals Hindu law both written and customary law to the extent provided by this act. All other laws in force up to the date of passing of this Act shall also cease to have effect.

vi) Chapter 2 of the Act contains 13 sections and deal with adoption. Section 5 lays down that all adoptions made after the commencement of this Act shall be regulated by the second chapter. Section 6 and Section 11 lay down the requisites of a valid adoption. Sections 7 and 8 deal with the capacity of a male and female Hindu to take in adoption; Section 9 deals with the capacity of persons giving in adoption; Section 10 deals with the eligibility of the adoptee; Section 12 deals with the effect of an adoption; Section 13 deals with the rights of adoptive parents to dispose of their properties. Section 14 deals with the determination of adoptive mother in certain cases; Section 15 lays down that a valid adoption cannot be cancelled by anything subsequently done or followed; Section 16 relates to the presumptions as to registered documents relating to adoption; Section 17, the last section in Second Chapter deals with the prohibition of certain payments by way of consideration passing on an adoption. Chapter 30 of the Act states that nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

vii) The Act is undoubtedly a progressive measure. The Act provides for the adoption not only of boys but also of girls.

viii) It is an enabling measure and does not emphatically, interfere with the religious beliefs of our people in any way.

ix) The Act does not provide for the performance of ceremony of 'Datta Homam'. The only requirements under the Act is to transfer the boy or the girl physically and acceptance of the child in adoption by the adopter.

x) For the purpose of adoption, whether of a son or a daughter, the consent of the wife will also be necessary. This is as it should be.

xi) A married woman cannot adopt a child in the life time of her husband. After the death of the husband she becomes fully competent to adopt a child. She no longer requires the prior consent of her husband to adopt after the death of her husband. Hindu female can adopt even during her maidenhood or after the death of her husband in the case he had died issueless. The adoption by a Hindu without the consent of his wife is void.

xii) Now, adoption is not based on the religious and spiritual considerations and the present Act rendered the adoption completely secular. This fact becomes distinct from the fact that the Act has permitted the adoption of a girl also and secondly, the ceremony Datta Homam is no longer necessary for adoption. A simple ceremony of giving and taking is only necessary.

xiii) The present Act of adoption has been applied to all the sub-schools of Mitakshasra as well as Dayabhaga alike and all the differences which existed between the two schools have come to an end.

xiv) An adoption will not date back to the time of their husband's death.

xv) Now after this Act the adopted child cannot divest any person of any property in the adopted family which has already vested in him.

xvi) One significant feature of the Act is that it will be possible for a person to adopt a child irrespective of his caste.

xvii) The maximum age for adoption has been fixed at fifteen but customs which enable a married person to be adopted in certain communities have not been interfered with.

xviii) The provisions regarding maintenance make no striking departure from the existing law. The question of maintenance will be fixed in case of dispute by Courts in accordance with principles which have become to be well established by judicial decisions so far. The illegitimate child has been given a right of maintenance which is very different from a right of inheritance. Thus the provisions regarding the maintenance of illegitimate children are in accordance with the existing Hindu Law.

Changes made by the Act: The Act has brought about remarkable changes in the law of adoption, some of which are as under.

i) The Act will apply only to Hindus but the term Hindu has been interpreted in a very wide connotation so as to include Jains, Sikhs and Buddhists. All the texts, rules and customs, which were in vogue, immediately before the Act came into existence shall cease to have effect with respect to any matter for which provision is made in this Act.

ii) The Act specially affected the right and capacity of a Hindu female to adopt a child. A married woman cannot adopt a child in the life time of her husband without his consent. After the death of the husband she becomes fully competent to adopt a child. She no longer requires the prior consent of her husband to adopt after the death of her husband. Hindu female's right to adopt has been considerably enlarged. She can adopt even during her maidenhood or after the death of her husband in case he had died issueless.

iii) The Act provides for the adoption not only of boys but also of girls.

iv) The Act does not provide for the performance of ceremony of 'Datta Homam'. The only requirements under the Act is to transfer the boy or the girl physically and acceptance of the child in adoption by the adopter.

v) There have been significant changes in the law relating to the consequences of a valid adoption. Now after the Act the adopted child cannot divest any person of any property in the adoptive family which has already vested in him. Under the old law the adopted son was competent to divest any collateral of any property which had vested in him before the act of his adoption, but under the present Act the adopted child cannot do the same.

Thus the Doctrine of Relation Back has been completely abrogated according to which a son adopted by the widow was deemed to have come into existence in the adoptive family on the day of the death of her husband.

vi) Now under the present Act a male Hindu cannot adopt a child except with the consent of his wife whereas no such law existed prior to the Act. Under the old law the widow could not adopt except with the consent of her husband. The law has been reversed.

vii) The present law of adoption has been applied to all the sub-schools of Mitakshara as well as Dayabhaga alike and all the difference which existed between two schools have come to an end.

Lecture - IV: Adoption

This lecture covers:

1. Introduction.
2. Kinds of Sons.
3. Adoption: Meaning and Definition.
4. Adoption under Old Law.
5. Adoption under Modern Hindu Law.
6. Requisites of a Valid Adoption.
7. Who may Adopt
   - A) Capacity of Male (Section 7).
   - B) Capacity of Female (Section 8).
   - C) Who may give in Adoption (Section 9).
   - D) Persons who may be Adopted (Section 10).
8. Effects or Consequences of Adoption (Section 12).
9. Effects of Adoption before the Act of 1956 (The Doctrin of Relation Back).
10. The Doctrine of Factum Valet, and
11. Ante-Adoption Agreement.

1. ADOPTION (Meaning, Who May Take And Give In Adoption Conditions Etc.)

Introduction: The institution of sonship has been conferred supreme status in the institution of marriage in every society. Right from the Vedic age to the present day society, the strong desire among Hindus, is to have a 'varasa' i.e. the naturally born legitimate son. The desire to have a son received supreme recognition since the son is regarded as a means of salvation. One of the main objects of marriage is 'Praja Sampatti', which can be made possible only by the son. The son, by performing obsequies, puts the parted parent/ ancestor in heaven from hell and hence, the son is called 'Putra'.

Thus, the son/putra may be described as the ladder in lifting the parted parent/ancestor from hell to the heaven.

There are two noble causes for the emergence of the institution of adoption among Hindus namely 'Pindodaka Kriyahetu' and 'Namasankeerthanayacha'. Pindodaka Kriyahetu means, "one, who continues the family name". Thus, the son, who is also known as 'Vamsodharka' continues the existence of the family' name from the generation to generation. The Veda declares: 'Endless are the worlds of those who have sons; there is no place for the man who is destitute of male offspring.' Yajanavalkya Says: 'Because continuity of the family in this world and the attainment of the heaven in the next are through sons, son's sons and son's son's sons, therefore women should be loved and protected'. Manu explained the necessity of a son because through a son, a man conquers the world, through a grandson he obtains immortality and through his great-grandson he gains the world of the son. Therefore, Manu enunciated that, it is the foremost duty of a man, who is sonless, to have a son by any means

2. KINDS OF SONS

Earlier, there were 12 kinds of sons. Two more kinds of sons were added by a few text writers as stated below:

i) The Aurasa or the Legitimate son.
ii) The Dattaka or the Adopted son.
iii) Kritrima or the son made.
iv) Kshetraja.
v) Gudhaja.
vi) Kanina.
vii) Putrika Putra.
viii) Sahodhaja.
ix) Krita.
x) Kritrima.
xi) Svayamadatta.

xii) Paunarbhava.

xiii) Apviddha.

xiv) Nishad.

Of all the above fourteen, the first two namely Aurasa (or Legitimate son) and Dattaka (or the Adopted son) are the approved and mostly accepted and the rest of twelve are absolute.

i) The aurasa or the legitimate sons: The son begotten by a man himself upon his lawfully wedded wife is the aurasa, the best of all sons.

***ii) The dattaka or the adopted sons*:** A boy given voluntarily by his parents to an unfortunate son-less man being of the same caste and gift confirmed with a libation of water is known as the dattaka of the man to whom he is given.

***iii) Kritrima or the son made*:** A boy accepted like one's own son for the sake of his qualities as such, after examining his qualities or faults as a son of one's own caste, is known as the Kritrima son. The latter two are different kinds of adopted sons.

***iv) Kshetraja*:** The son begotten by niyoga, as approved by the Shastra, on one's own wife by another man with the consent of the husband, or impotent, is known as Kshetraja.

***v) Gudhaja*:** Son secretly brought forth by the wife. A son born in the family but as to who begot him being unknown, is known as the gudhottpanna (gudhaja) son of the one on whose wife he is begotten.

***vi) Kanina*:** Son secretly born to an unmarried damsel. The secretly born to a maiden in her father's house is known as the kanina son of the one who marries her.

***vii) Putrika putra*:** Son of an adopted daughter. The sonless man may appoint his daughter with the words 'the son of his daughter shall perform my Shraddha' or this daughter of mine who has no brother; I give thee decked with ornaments. The son begotten on her shall be like my son. The son begotten on a daughter appointed

in this manner was called the putrikaputra and Manusmriti treated such a son at par with the aurasa son.

***viii) Sahodhaja*:** Son born of a wife who was pregnant at the time of marriage. The son born of that pregnancy is known as the sohadha (sohadhaja) son of that man.

***ix) Krita*:** Son purchased. The son, whether of one's own caste or not, purchased for a price from his parents is the Krita son of the purchaser.

***x) Kritrima*:** Son made that is orphan and adopted.

***xi) Svayamadatta*:** Where an abandoned son offers himself to some one. An orphan or one who is without cause deserted by his parents, becomes the svayamadatta son of one to whom he offers himself as such.

***xii) Paunarbhava*:** Son of a remarried woman. The son born to a woman deserted by her husband or a remarried widow, of her own desire, is known as the paunarbhava son of the begetter.

***xiii) Apviddha*:** Where an abandoned son was accepted by a person on his own initiative.

xiv) One more kind of son was added by some law givers called ***Nishad*,** i.e. a son of a Brahmin by his shudra wife.

Because of the great importance of son, adoption received the supreme recognition. Earlier, i.e. under the old law, boy (male child) alone could be adopted. Now, i.e. according to the Modern Hindu Law, both a boy and girl (male and female child) can be adopted.

3. ADOPTION – MEANING AND DEFINITION

"Adoption is an act of giving and taking a child, male or female into the family having no son or daughter". According to Manu adoption is the 'taking of a son, as a substitute for the failure of a male issue.' Thus it is a transplantation of a son from the family in which he is born to another family where he is given by the natural parents by way of gift.

Manu defines adopted son as, 'A son equal in caste and

affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as the Dattrima (=Dattaka) son.

The law of Adoption is regulated by Chapter-II, containing Secs. 5 to 17 of the Hindu Adoptions and Maintenance Act, 1956.

In all texts it is agreed that adopted son is 'given away'. Under the textual Hindu Law, the main motive of adoption was religious. The religious motive is undeniable evidence from Baudhayana's text. 'I take thee for fulfillment of my religious duties. I take thee to continue the line of my ancestors.'

4. ADOPTION UNDER OLD LAW

The origin of the custom of adoption is lost in antiquity, and may well have been no more than the natural desire for a son as an object of affection, a protection in old age, and to have an heir. 'The foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites' (*Amrendra v. Sanatan,* AIR 1933 PC 153 : 35 Bom. LR 859 : 1933 ALJ 710). But as times passed and better order reigned in society, the number of subsidiary sons diminished with the increasing abhorrence to the sexual looseness which characterized the recognition of many of them, and the importance of the adopted son began to increase. The rise of the adopted son in the estimation of the society was further accelerated by the Brahmin priests who advocated the institution of adoption as absolutely necessary for every sonless man's salvation both, here and in the world beyond. It can be said that the practice of adoption, as it exists today, is not only on account of the timorous superstition of Hindus that by leaving a male child in this world, one can secure himself from the torments of the next world, but also to the secular desire for the perpetuation of family properties and names.

According to Old Law, a man could adopt a boy without the consent of his wife. But, a woman could not adopt during the life time of her husband or after his death except under authority given

to her by the husband or with the consent of his sapindas. The adopted son should be of the same caste. An illegitimate boy or congenitally deaf and dumb boy could not be adopted. Only parents could give a boy in adoption. A daughter could not be adopted. There was no age restriction between the adopter and adoptee.

5. ADOPTION UNDER MODERN HINDU LAW

The Hindu Adoptions and Maintenance Act, made adoption a secular institution. It lays down various provisions relating to Adoption (and Maintenance). The Act removed the restrictions under Old Law. Under the Act, **girl** also can be taken in adoption.

6. REQUISITES OF A VALID ADOPTION (SEC. 6)

(i) The person adopting (taking in adoption) must have capacity to do so and shall also have a right to take in adoption.

(ii) The person giving in adoption must have the capacity (and right) to do so.

(iii) The person adopted is capable of being taken in adoption; and

(iv) The adoption is made in compliance with the conditions in Chapter-II of the Act (The Hindu Adoptions and Maintenance Act, 1956)

***Ceremonies of valid adoption*:** The ceremonies to be performed for a valid adoption may be explained with reference to the following heads:

A) Ceremonies among Sudras, and

B) Ceremonies among Brahmins.

***A) Ceremonies among Sudras*:** The Dattaka ceremony consists in a giving of the child in adoption by a person competent to do so and receiving of the child in adoption by a person who has capacity to adopt. In *Lakshmi Singh v. Smt. Rupkunwar,* (AIR 1961 SC 1378), the child of 'A' was sent by 'A' through his agent to the house of the 'B' in another town for the purpose of admission to a school and education. It was contended that this constituted a giving and

taking for purposes of adoption as 'B' had been thinking of adopting that boy and 'A' had expressed his willingness to give the boy in adoption. It was held that there should be a giving and taking for the express purpose of effecting the adoption and that this condition was not satisfied in this case so that there was no valid adoption. Subbarao, J. also observed that the physical act of giving or taking may be delegated to someone else. Thus when a person is seriously ill he may not himself physically be able to give or receive in adoption. This does not mean that a valid adoption cannot be made in such a case. Delegation of the physical act is permissible but the giving and receiving must be done through with the intention on the part of the giver and the taker that it is for purposes of adoption.

***B) Ceremonies among Brahmins*:** The physical act of giving and taking is essential as in the case of Sudras. Further, a Datta Homam was necessary prior to the Act of 1956. The Act has dispensed with the religious ceremony of Datta Homam. So now the ceremonies of adoption are the same irrespective of the caste of the parties.

Relevant Case Law:

In *Lakshman Singh Kothari v. Smt. Rup Kanwar* (AIR 1961 SC 1378), it was observed that it may be noted here that transfer of adopted boy by ceremony of giving and taking is essential though no particular form of giving and taking is prescribed.

In *Smt. Chandan Bilasini by L.Rs. v. Allabuddin Khan,* (AIR 1996 SC 59), it was held that where adoption took place by ceremony of giving and taking, it is a valid adoption.

In *Devgonda v. Shamgonda,* (AIR 1992 Bom. 189), it was observed that there is a presumption that the ceremony of giving and taking must have taken place and it is for the plaintiff to prove that the ceremony of giving and taking has not taken place.

In *Kashi Nath v. Mahadev,* (AIR 1977 Pt. 156), it was observed that adoption does not become valid merely by writing a deed with an intention to give the child in adoption, it requires the actual giving and taking of the child. In the process of giving and taking the presence of natural parents, adoptive parents and the child is necessary.

In *Golak Chandra v. Pratibas,* (AIR 1979 Ori. 205), it was held that any adoption in non-compliance with the conditions of Sections 6 and 11 of the Act would be invalid. The fulfillment of these conditions is mandatory for a valid adoption. The ceremony of giving and taking is essential as it is mandatory requirement for the valid adoption.

7. WHO MAY ADOPT (SECTIONS 7 & 8)

Sections 7 and 8 of the Hindu Adoptions and Maintenance Act deal with capacity of male and female Hindu respectively to take in adoption.

A) Capacity of Male (Section 7): Section 7 of the Hindu Adoptions and Maintenance Act deals with capacity of a male to take in adoption. It runs as follows:

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption – Providing that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind.

Explanation: If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

According to Section 7, any male Hindu, whether he is a bachelor or married or widower may take a boy or girl in adoption provided the following conditions are satisfied:

(i) He must be of sound mind;

(ii) He is not a minor;

(iii) If he has a wife living, he must take the consent of his wife/wives (if any). The consent is not necessary if she (his wife) has renounced the world or of unsound mind.

(iv) If a male Hindu adopts a female child, the difference of age should be 21 years (Sec. 11).

Burden of Proof: Burden of proving valid adoption is on the party pleading adoption (*Hara Dibya v. Pravakar Satpathy* (1991 (1) All India Hindu Law Reporter (Ori) 247).

Consent of Wife: Consent of wife is essential and mandatory for taking adoption. Where there are two wives, the consent of both the wives will be essential (*Bholooram v. Ram Lal* (1989 (2) HLR 162 (MP).

In *Smt. Malati Roy Chowdhury v. Sudhindranath Majumdar & Others* (AIR 2007 Cal. 41, relying on 1977 (79) Bom. L.R. 426), it was held that a male is entitled to adopt but if he is a married person, consent of wife is necessary.

B) Capacity of Female (Section 8)

Female: A widow may make an adoption. Under the old law the power of a widow to adopt depended upon the School of Law to which she belonged.

Mithila: A widow could not adopt at all.

Bengal: A widow could adopt only with prior authority from husband conferred upon her during his lifetime.

Madras: A widow could adopt even with the assent of her husband's Sapindas after husband's death.

Bombay: No one's consent is necessary.

The Act of 1956 has introduced uniformity by dispening with consent of any one by whatever School of Law the widow may be governed.

Section 8 deals with capacity of a female to take in adoption. It runs as follows:

Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption:

Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Section 8 of the Act, provides for the capacity of a female Hindu to take a son or daughter in adoption if the following conditions are satisfied.

(i) She is of sound mind;

(ii) She is not a minor; and

(iii) She is not married; if married, the marriage had been dissolved, or her husband is dead or renounced the world or ceased to be a Hindu or had been declared to be of unsound mind by a court of competent jurisdiction.

If she adopts a male child, the age difference should be 21 years (Section 11).

In *Abhisek Sharma v. State of U.P & Another* (AIR 2009 All. 77), the prohibition as against adoption imposed by the Shastric Hindu Law cannot be made applicable and a female Hindu can adopt a daughter or son after the death of her husband.

An Unmarried woman having an illegitimate child also can make adoption (*Ashoka Naidu v. Raymond,* AIR 1976 Cal. 272).

A Co-widow has a right to make adoption to herself even though the other co-widow is having a child through her husband (*Ashok v. Bhagwathi Ammal,* 1993 (1) HLR 677).

C) Who may give in Adoption (Section 9)

Section 9 speaks about a person (father/mother/guardian etc.), who can give in adoption. It runs as follows:

1. No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

2. Subject to the provisions of sub-section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption; Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

3. Sub-section 3 omitted by Act 30 of 2010. Prior to its omission it read as – '(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind'.

4. Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a Court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the Court to any person including the guardian himself.

5. Before granting permission to a guardian under sub-section (4) the Court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the Court may sanction.

Explanation: For the purpose of this section:

i) The expressions 'father' and 'mother' do not include an adoptive father and an adoptive mother;

'guardian' means a person having the care of the person of a child or of both his person and property and includes:

a) a guardian appointed by the will of the child's father or mother, and

b) a guardian appointed or declared by a Court.

ii) 'Court' means the City Civil Court or a District Court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

The father – The father cannot now give the child in adoption without the consent of the mother of the child. The consent of the

mother of the child may be dispensed with in any one of the following three cases:

a) If she has finally and completely renounced the world.

b) If she has ceased to be a Hindu, or

c) If she has been judicially declared to be of unsound mind.

In no other case, even if the marriage has been dissolved, consent of the mother can be dispensed with. In the absence of mother's consent, adoption is void.

The expression 'father' here does not include an adoptive father, putative father or stepfather. The putative father of an illegitimate son is not included even if subsequent to the birth of the child, he had married the mother of the child, because Hindu law does not recognize legitimation.

The mother – The mother of an illegitimate child has power to give the child in adoption and no question arises of putative father's consent. But the mother of a legitimate child has during the life-time of the father, no power to give the child in adoption even with the consent of the father. Under the Act the mother of a legitimate child can give the child in adoption during the life-time of the father only in the following cases:

a) If the father has ceased to be a Hindu.

b) If he has finally and completely renounced the world, or

c) If he has been judicially declared to be of unsound mind.

In these cases dissent of the father is of no consequence. But a remarried woman has no right to give away in adoption her son born to her from her deceased husband, since Section 3, Hindu Widow Remarriage Act, 1956 divest her of her right of guardianship over children born to her from her deceased husband (*Martland v. Narayan*, 1939 Bom. 305).

The mother has power to give her legitimate child in adoption after the death of the father. Even if a father, before his death expressed himself categorically that his child should not be given in

adoption, the mother can, after his death, validly give the child in adoption.

The expression 'mother' does not include adoptive mother or stepmother and therefore a stepmother or adoptive mother has no capacity to give the child in adoption. But it seems that a mother on conversion to another religion will not lose her right to give the child in adoption, since Section 9(4) does not empower a guardian to give the child in adoption in case the parent has ceased to be a Hindu. Mother also does not lose her right of giving the child in adoption on divorce.

The Guardian – The term 'guardian' includes both *de jure* and *de facto* guardians. Thus, a manager, secretary or any person in charge of an orphanage or a person who has brought up the child, or under whose care the child is, can give the child in adoption (*Dhanraj v. Suraj*, 1981 Pat. 204). A guardian can exercise the power only in the following cases:

a) If both the parents are dead.

b) If parents have finally and completely renounced the world.

c) Parents have been judicially declared to be of unsound mind.

d) If parents have abandoned the child, or

e) If the parentage of the child is not known, just as in the case of a foundling or a refugee-child.

According to Section 9, the father, mother or guardian can give a child in adoption subject to certain restrictions. The conditions to be fulfilled by the father are identical to the conditions of the father taking in adoption under Section 7. A woman can give her son or daughter in adoption if her husband is not alive or if he (her husband) has renounced the world, or ceased to be a Hindu or has been declared to be of unsound mind by a Court of law. The guardian can give a child in adoption if the child's parents are dead, or renounced or declared to be of unsound mind or if the parentage of the child is unknown. The guardian may be a testamentary guardian or appointed

by the Court. The guardian must obtain permission from the Court before giving the child in adoption.

D) Persons, who may be Adopted (Section 10)

Section 10 provides for a person (boy or girl) to be given in adoption. It runs as follows:

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:

i) He or she is a Hindu.

ii) He or she has not already been adopted.

iii) He or she has not been married unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption.

iv) He or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

Capacity of Boy or Girl to be adopted:

i) Boy: Under the Shastric Hindu Law only a son could be adopted. An orphan could not be adopted. An illegitimate son or an adopted son could not be given away in adoption. An illegitimate son or an adopted son could not be given away in adoption. Under the Bombay School of Law even a married man could be adopted. Under the other Schools this was not permissible. Among the regenerate classes after *Upanayanam* (Thread Ceremony) a boy could not be given away in adoption. There was no age limit as such for the boy to be taken in adoption.

The present law has profoundly altered the law on this subject. An orphan can be adopted. The guardian can give such a child in adoption with the permission of the court. An illegitimate son may be given in adoption by the mother. An adopted child, however, cannot be given in adoption again. A married man cannot be given in adoption but contrary custom is saved so that the Bombay School of Law

on this subject can still prevail in Maharashtra. Upanayanam does not bar an adoption now. But a stringent age limit is imposed. The adopted child could not have completed 15 years of age. Contrary customs are saved. If the adoption is by a female the adopted boy should be 21 years younger than the adoptive mother.

ii) Girl: Under the Shastric Hindu Law a daughter could not be adopted. There could be contrary custom but the general rule was that a female child could not be adopted. Now the Act has changed this position. A daughter may be adopted. When the adopter is a male, she should be 21 years younger than the adoptive father.

Under the pre-act law the person adopted should belong to the same caste as the person making the adoption. This requirement no longer exists. It is open to a Hindu to adopt from any of the castes. This is a welcome change in the law directed towards the secularization of the institution of adoption.

Section 10 of the Hindu Adoptions and Maintenance Act, provides for the capacity of a child/person to be adopted. The child (boy or girl) can be adopted provided the following conditions are satisfied:

(i) He or she is a Hindu;

(ii) He or she has not already been adopted;

(iii) He or she has not been married unless the custom or usage permits;

(iv) He or she has not completed the age of 15 years, unless the custom or usage permits and prevails in both the families (giving and taking in adoption).

In *Rakhi v. 1st Addl. District Judge* (AIR 2000 All. 166), it was observed that a person aged about 28 years can never be adopted. Section 10(iv) of the Act prescribed the age at 15 years. Such adoption is to follow the prescribed procedure for the adoption namely, actual giving and taking in adoption as prescribed in Section 11(vi) of the Act.

In *Masya Ram v. Jainarian* (AIR 1989 P&H 2031), it was held that the adoption of a married Jat boy who was above 15 years of age as valid on the force of customs prevailing in that community.

In *Moolchand v. Amrit Bai* (1976 HLR 681), where the parties belonged to the Gujarati Mochi Community governed by the Bombay School and a boy over 15 years of age was held that the adoption was valid.

In *Veeran Maheshwari v. Girish Chandra* (AIR 1986 All. 54), the Court held that where a child of above 15 years of age has been taken into adoption, in absence of any true custom to the effect that such adoption cannot be upheld even if the other party has not challenged the validity of the adoption. The Court itself can declare such adoption to be invalid.

In *Khazan Singh v. Union of India* (AIR 1980 Del. 60), where the adopted child originally belonged to the higher caste, but on adoption was to one belonging to the Scheduled Tribe and Schedule Tribe Certificate was granted to him on the basis of adoption and it was held that the certificate could not be cancelled without giving opportunity to the adoptee to prove that adoption was valid in spite of the bar of age.

In *Raghunath Behera v. Balaram Behera* (AIR 1996 Ori. 38), it was held that an only son could be given in adoption under the present Act which was prohibited under the old law. However as such adoption is unusual, strong evidence is required in proof of such adoption.

Other Conditions for a Valid Adoption (Section 11): In every adoption, the following conditions must be complied with:

i) If the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption.

ii) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu

daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption.

iii) If the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty one years older than the person to be adopted.

iv) If the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted.

v) The same child may not be adopted simultaneously by two or more persons.

vi) The child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth (or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption.

Provided that the performance of datta homam shall not be essential to the validity of an adoption.

Devgonda Raygonda Patil vs. Shamgonda Raygonda Patil, AIR 1992 Bom. 189 — In this case, the Bombay High Court laid down the following propositions:

i) Motive of adoption (whether good or bad) is immaterial;

ii) Lunacy or mental deficiency is no bar for adoption (i.e. a lunatic can be adopted);

iii) A registered adoption deed raises a presumption in favour of validity of the adoption; and

iv) The adoptee has no vested right in the joint family property or the family of his birth.

In *Sandhya v. Union of India* (AIR 1998 Bom. 228), the constitutional validity of Section 11 under Articles 14 and 21 was sought to be challenged. Section 11 of the Act prevents the adoption of more than one child belonging to the same gender. Holding that the

constitutional rights are not attracted the court held, 'a person could have any number of biological children, by grace of God. That does not certainly render support to claim to have any number of children by adoption.'

8. EFFECTS/CONSEQUENCES OF ADOPTION (SECTION 12)

Section 12 of the Hindu Adoptions and Maintenance Act, 1956 speaks about the effects or consequences of adoption. It reads as follows:

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

Provided that:

i) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth.

ii) Any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations if any attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth.

iii) The adopted child shall not divest any person of any state which vested in him or her before the adoption.

After adoption, the adopted child becomes the aurasa son of his adoptive parents and gets disqualified to perform Sradha, Pinda Karma of his natural parents. Section 12 of the Hindu Adoptions and Maintenance Act, 1956 deals with the effects/consequences of the Adoption.

1. An adopted child is deemed to be the natural born child of his/her adoptive father/adoptive mother.

2. All the ties of the adopted child with the original family stand extinguished from the date of adoption (i.e. Kinship disappears in the original family and is born in the adoptive family). This rule is subject to the following exceptions:

(a) The child cannot marry any person, whom he/she could not have married prior to the adoption.

(b) The property vested in the child prior to the adoption shall continue to vest, subject to the obligations.

(c) The adopted child shall not divest any person in the adoptive family of any estate, which is vested in him/her before the adoption. (i.e. the adoption of child does not affect the rights and the members of the adoptive family).

Other Provisions:

1. According to Section 13, adoption does not deprive the adoptive parents to dispose of their property unless there is an agreement to that effect.
2. Section 14 determines adoptive mother. If adoption was made by a male Hindu, his wife is adoptive mother, though she is unsound. Where there are more than one, the seniormost is the adoptive mother and the rest are step mothers.
3. According to Section 15, an adoption once made cannot be concealed since it is a matter of status, not a contract.
4. Section 16 deals with registered deed of adoption; and
5. According to Section 17 payment in consideration for adoption is prohibited.

Registration of Adoption (Sec.16): Section 16 of the Act, provides for the registration of adoption with Registrar of Documents. If the adoption is registered the registered instrument duly signed by both the parties serves as a piece of evidence, but not conclusive proof of the evidence.

9. EFFECTS OF ADOPTION BEFORE THE ACT OF 1956 (The Doctrine of Relation Back-paternal Affiliation)

Before the Act, the doctrine of relation back was in operation.

The Doctrine of Relation Back (Paternal Affiliation): Adoption confers rights on the child w.e.f. the date of adoption. This position was the same in the old law also. But under old law, when the adoption was made by a widow, the adoption would come into force from the date of the death of her (widow's) husband. This doctrine gives retrospective effect to adoption by a widow under the Old Law. In other words, all the rights of the adoptee (person taking the son in adoption) related back from the date of death of the adoptive father (widow's husband). The reason was the woman could not adopt on her own without the consent/authority of her husband or his sapindas. Therefore, the adoption is deemed to have taken place on the date of the death of her husband.

The Relevant leading case on this point is

Sawan Ram vs. Kalawati AIR 1967 SC 1761.

Facts of the Case : In this case, a Hindu male died in 1948, leaving behind his widow without children. The widow took the properties of her deceased husband as a limited owner. In 1954, the widow made a gift of some land from the husband's property to her grand niece, which was challenged by her husband's collateral. The collateral sued for possession of the land. The trial court granted the declaration in favour of the collateral. The grand-niece preferred an appeal before the Supreme Court. While the appeal was pending, the widow adopted a son in 1959 and died in the same year.

The Supreme Court held that the son adopted by the widow was deemed to be the son of her deceased husband and the adoption would be effective from the date of the death of her husband (i.e. in 1948). Therefore, the adopted son was entitled to inherit the property of the deceased husband.

Principle: The principle applied in the instant case was, "it is

well-recognised that after a female is married, she belongs to the family of her husband. The child adopted must also, therefore belong to the same family. On adoption by a Hindu female, who has been married, the adopted son will, in effect, be the adopted son of her husband also".

The above view laid down in Sewan Ram's Case was followed by the Supreme Court in *Sitabai vs. Rama Chandran*, AIR 1970 SC 345.

The Doctrine of Relation Back "has been abolished by Section 12 of the Hindu Adoptions and Maintenance Act, 1956 and hence, it is no more a law at present.

10. THE DOCTRINE OF FACTUM VALET

The maxim "Quod fieri non debris factum valet or the Doctrine of Factum Valet", is a Latin maxim, which means 'what ought not to be done is valid, when done".

After adoption, the child becomes the aurasa (naturally born son of the adoptive parents) and also gets disqualified to perform 'Sradha Karma, Pinda Karma, or Kanyadan of his natural parents. In case, there is no other person competent to perform the ceremonies, shastras permit the adopted son to perform the Sradha Karma, Pinda Karma and Kanyadan. This is known as 'Factum Valet'. This doctrine was recognised both by the Mitakshara and Dayabhaga Schools. When there is a rule, which governs an act (not to be done) and the act is done, it cannot be rendered invalid. This doctrine does not have universal application since every prohibited act, when done cannot be ratified.

Under the Hindu Law, this doctrine gets recognition mainly in the Law of Marriage and Law of Adoption. Non-compliance of certain things relate to a moral precept, then the violation does not vitiate the proceedings. *Eg.*:— Marriage overlooking age limit; marriage of a minor without the consent of the guardian. But where a violation relates to an imperative provision of law viz. incapacity, non-compliance of essential ceremonies (Homa, Saptapadi) renders the marriage void and the doctrine does not apply in such cases. There may be other

ceremonies, which are not essential. If they are omitted, such omission is cured (saved) by this doctrine. The doctrine applies where there is no fraud or force.

11. ANTE-ADOPTION AGREEMENT

Ante-Adoption Agreement means "An agreement **before the Adoption.** It is entered into between the natural parent (person giving the child in adoption) and the adoptive parent (person taking the child in adoption) **before the adoption** in regard to the rights of the adoptive child in the property of the adoptive parent. It protects the interests of the child (to be given in adoption) in regard to the property of the adoptive parent.

Section 13 of the Hindu Adoptions and Maintenance Act, 1956 makes provision for the Anti-Adoption Agreement.

Before adoption, the adoptive father, being the sole surviving coparcener, can alienate the property by will or by a transfer inter vivos (i.e. transfer between the two living persons). If so, the adoptee (adopted child, who becomes a coparcener after the adoption) cannot question the alienation by the adoptive father. If the property alienated is the self-acquired property of the adoptive father, the adopted child cannot question the alienation even after the adoption.

The difficulty as to the right of alienation of the adoptive father arises, if the property is ancestral and the alienation is made after the adoption (i.e. the boy acquires the status of coparcener on adoption. If the child is a female, she also becomes coparcener in Andhra Pradesh in pursuance of the A.P. Amendment Act, 1986). To obviate such situation, the adoptive parent to protect his interests, may resort to enter into an agreement with the natural parent before taking the child in adoption. Such agreement is called the "ante-adoption agreement" (designed to protect the interest of the adoptive father).

CASE COMMENT (PART-C)

Problem: 'A', a Hindu male died in 1953, leaving behind his widow, 'W' without children. 'W' inherited the properties of her deceased husband. In 1954, 'W' made a gift of some land from the husband's property to her grand niece 'N', which was challenged

by her husband's collateral, 'C'. 'C' sued for possession of the land. The trial court decided in favour of 'C'. 'N' preferred an appeal. While the appeal was pending, 'W' adopted a son 'S' in 1959 and died in the same year - Decide.

Ans. Instant problem relates to the "the Doctrine of Relation Back" from the 'effects of adoption' and attracts Sec.12(c) of the Hindu Adoptions and Maintenance Act, 1956.

The relevant leading case of the problem is *Sawanram vs. Kalawati* 1967 SC 1761.

The doctrine of Relation Back gives restrospective effect to the adoption. (Write now in brief about the doctrine of relation back).

According to Sec.12(c) of the Hindu Adoptions and Maintenance Act, 1956, the adopted child shall not divert any person of any estate, which rested in him or her before the adoption.

Write now the Sawanram's case in detail as explained under the doctrine of relation back.

In view of the above, that the adoption by 'W' in 1959, shall have the retrospective effect from the date of the death of 'A'. Further, 'S' (adopted son) cannot divert any estate, which had vested in 'W' prior to his adoption. Therefore, the gift of the land by 'W' to 'N' is valid.

Problem: Sujatha, an unmarried woman adopts a daughter, Sudha. Later, Sujatha married Krishna and has a son by him. Krishna dies leaving property. Who succeeds his property? Why? (A.U., July 2000, Part-C, Q.1 and A.U. Dec. 2000, Part-C, Q.2, Marks : 20 with change of names as Harsha, Sony and Sastry in the place of Sujatha, Sudha and Krishna respectively).

Clues: Under the Hindu Adoptions and Maintenance Act, 1956, a female child also can be adopted and an unmarried woman can adopt. Hence, the adoption of Sudha by Sujatha is valid. (Write (i) the requisites of valid adoption under Sec.6; (ii) the capacity of a female to take in adoption under Sec.8).

Sudha being the step daughter of the deceased (Krishna) cannot inherit. The son, being a Class-I heir succeeds to the property. (Also write the relevant provisions under the Hindu Succession Act, 1956 (Ss. 8 to 13).

QUESTIONS AND HOW TO ANSWER

Q) Doctrine of Relation Back. (A.U., Model Q.P. Part-A, Q.8, Marks: 4)

Ans. Write in a paragraph/one page.

Q) Doctrine of factum valet. (A.U. Model Q.P., Part-A, Q.9, Marks: 4)

Ans. Write in brief (i.e.) one paragraph/page)

Q) Explain as to how adoption is secularised by the modern Hindu Law. (A.U. July 2000, Part-B, Q.1, Marks:18)

Ans. Write the introduction, meaning, adoption under Old Law and modern Hindu Law.

Q) Who can give a child in adoption (N.U. April 1999, Part-A, Q.6, Marks: 4)

Ans. Write who may give in Adoption (Section 9)

Q) Who can take a Hindu Child in Adoption? (N.U. Sept.1999, Part-A, Q.9, Marks: 4)

Ans. Both a male and female can take a child in adoption. Write now, capacity of Male (Sec.7) and Capacity of Female (Sec.8) to take a child in adoption in brief.

Q) Elucidate the effects of Valid Adoption under Hindu Adoptions and Maintenance Act, 1956. (N.U. April, 1999, Part-B, Q.13, Marks: 18)

Ans. Write introduction, meaning and effects of adoption including the doctrine of Relation Back in brief.

Lecture-V: Maintenance

A Hindu has a personal obligation to maintain (i) his wife, (ii) children; and (iii) aged parents. In addition, a widowed daughter-in-law, dependents of a deceased Hindu and members of the joint family are entitled to maintenance. This lecture deals with the maintenance of a Hindu wife. It covers the following heads:

1. Maintenance: Meaning and Definition.
2. Persons entitled to get Maintenance.
3. Maintenance of Wife
   - A) The Hindu Adoptions and Maintenance Act, 1956 (Section 18).
   - B) The Hindu Marriage Act, 1955 (Sections 25 and 26).
   - C) The Code of Criminal Procedure, 1973 (Section 125).

1. MAINTENANCE : MEANING & DEFINITION

The term 'maintenance' has been used in a wide sense. It implies/ imposes an obligation to provide certain basic needs viz. food, clothing, shelter etc. without which a person cannot survive. It is a right to get the necessities which are reasonable. A text of Manu cited in the Mitakshara and the Parasara Madhavya lays down – 'It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds'. Under Hindu law a person has personal obligation to maintain his wife, children and aged and infirm parents. It arises from the very nature of the relationship and exists whether he possesses property or not.

Supreme Court observed in *Raghubar Singh v. Gulab Singh* (AIR 1998 SC 2401), that right to maintenance of Hindu wife is a pre-existing right that existed even under Shastric Hindu law. It was not created by 1937 or 1946 Acts.

Section 3(b) of the Hindu Adoptions and Maintenance Act, 1956 states that maintenance includes:

i) In all cases, provision for food, clothing, residence, education and medical attendance and treatment.

ii) In the case of an unmarried daughter, also the reasonable expenses of an incident to her marriage.

Thus the Act recognizes five essential basic requirements in life, namely food, cloth, residence, education and medical care necessary for proper maintenance of a person. Whenever provision is made for the maintenance of a dependant it contemplates that all these essentials of life are provided to such a dependent.

The expression 'includes' of the definition shows that the definition is not exhaustive. In appropriate cases the court may hold that the expression 'maintenance' covers other cases also. Maintenance includes a wife's right to residence.

Clause 3(b)(ii) refers only to an unmarried daughter and therefore does not include a widowed daughter or a daughter who has obtained a decree for divorce. The daughter who has been forced to obtain a divorce should not be given the right to maintenance.

In *Vellaiyappa Chetty v. Natrajan* [(1931) 581 A 402], it has been held that the right of maintenance includes persons who by reason of personal disqualification are not allowed to inherit, such as, the idiot, the mad man or the rest. Such persons are excluded from inheritance and a share on partition is given to them in lieu of maintenance.

In *Anil Kumar v. R.Nair* (AIR 1985 Kar. 20), it was observed that the expression 'maintenance' includes the basic requirements of life. This is the responsibility of parents and it cannot be avoided by one parent on the pretext that such liability is taken up by the other parent. Father and earning mother both are bound to contribute to the maintenance of their children in proportion to their income.

2. PERSONS ENTITLED TO GET MAINTENANCE

According to the personal law of Hindus, every member in a family is either entitled to a share or is entitled to maintenance out of family property. Under the Hindu Adoption and Maintenance Act,

1956, the following categories of persons are entitled to claim maintenance:

1. Wife.
2. Widowed daughter-in-law.
3. Aged infirm parent and the children;
   a) Legitimate and illegitimate son;
   b) Legitimate and illegitimate daughter;
   c) Aged and infirm parents.
4. The dependents of the deceased, which include:
   a) His father.
   b) His mother.
   c) His widow.
   d) The son, son of a predeceased son and the son of a predeceased son of a predeceased son of a predeceased son of the deceased.
   e) His unmarried daughters, the unmarried daughters of a predeceased son and the unmarried daughters of a predeceased son of a predeceased son.
   f) His widow daughter.
   g) The widow of the son and the widow of the predeceased son of a predeceased son.
   h) His minor illegitimate sons.
   i) His unmarried illegitimate daughters.

3. MAINTENANCE OF WIFE

Relevant Legal Provisions: A Hindu married woman, who has been separated from her husband on reasonable cause, is entitled to claim maintenance under the following provisions namely,

A) Section 18 of the Hindu Adoptions and Maintenance Act, 1956.

B) Sections 24 and 25 of the Hindu Marriage Act, 1955.

The above two provisions are applicable to Hindus only.

C) Section 125 of the Code of Criminal Procedure : It is a special provision, applicable to all irrespective of their religion i.e. Hindus and Non-Hindus.

The relief under Sections 24 & 25 Hindu Marriage Act, 1955 and Section 125 Cr.P.C. is available to a married woman, who is unable to live on her own (or she has no source of livelihood). While the relief under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 is available to a Hindu Wife, though she is able to live on her own.

A) The Hindu Adoptions & Maintenance Act (Section 18)

Section 18 of the Hindu Adoptions and Maintenance Act deals with the maintenance of a Hindu Wife. It reads as follows:

1. Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life-time.

2. A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance:

i) If he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her.

ii) If he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband.

iii) Omitted

iv) If he has any other wife living.

v) If he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.

vi) If he has ceased to be a Hindu by conversion to another religion.

vii) If there is any other cause justifying her living separately.

3. A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

The relief (maintenance) under Section 18 is available, though she is able to live on her own (i.e. employed or propertied). A Hindu Wife, who got married legally, before or after the Act can claim maintenance from her husband throughout her life time, under the following circumstances:

i) If her husband is guilty of desertion without reasonable cause or without her consent or against her will or wilfully neglecting her;

ii) If he is guilty of cruelty causing reasonable apprehension to her mind and that it will be harmful or injurious to live with him;

iii) If he has any other wife living (bigamy);

iv) If he keeps a concubine (Avarudha Sthri) in the same house and resides with the concubine elsewhere;

v) If he is ceased to be a Hindu by conversion to other religion; and

vi) Any other reason justifying her to live separately.

Under Section 18 of the Hindu Adoption and Maintenance Act, two separate rights have been conferred on the wife.

1. Right to maintenance.
2. Right to separate residence.

According to Section 18(4) of the Act, an unchaste wife is not entitled to claim maintenance. (Unchastity forfeits the claim of maintenance).

Amount of Maintenance (Section 23): Section 23 of the Act empowers the Court to determine the amount of the maintenance. It runs as follows:

1. It shall be the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so, the Court shall have due regard to the considerations set out in sub-section (2), or sub-section (3) as the case may be, so far as they are applicable.

2. In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to:

a) the position and status of the parties;

b) the reasonable wants of the claimant;

c) if the claimant is living separately, whether the claimant is justified in doing so;

d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;

e) the number of persons entitled to maintenance under this Act.

3. In determining the amount of maintenance, if any, to be awarded to be a dependant under this Act, regard shall be had to:

a) the net value of the estate of the deceased after providing for the payment of his debts;

b) the provision, if any, made under a will of the deceased in respect of the dependant;

c) the degree of relationship between the two;

d) the reasonable wants of the dependent;

e) the past relations between the dependant and the deceased;

f) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;

g) the number of dependants entitled to maintenance under this Act.

In simple words, the court, while determining the amount of maintenance, takes into consideration, the following factors.

i) The position and status of the parties;

ii) Reasonable wants of the claimant;

iii) Justification of separate living by the claimant;

iv) Claimant's earnings, value of her property and income from such property; and

v) The number of persons entitled to maintenance under the Act.

According to Section 24, 'no person shall be entitled to maintenance if he/she is ceased to be a Hindu by conversion to another religion. In other words, the claimant should be a Hindu, Section 25 says that the amount of maintenance is subject to alteration when the court thinks fit.

B) The Hindu Marriage Act (Ss. 24 & 25)

Section 24 of the Hindu Marriage Act, 1955 provides for the Maintenance pendente lite and expenses of the proceedings, and Section 25 deals with permanent alimony and maintenance. The relief under the Sections 24 & 25 is available to a Hindu wife, who is unable to live on her own. Further, it is to be noted that a Hindu husband unable to live on his own also can claim maintenance under Sections 24 & 25.

Maintenance pendente lite and expenses of proceedings (S.24): A Hindu husband or wife, who does not have sufficient means for maintenance and expenses to conduct the proceedings can bring an action under Section 24 of the Hindu Marriage Act, 1955. Both the spouses are placed equally in respect of the liability for payment of the interim maintenance and expenses. If a petition is pending before the court for restitution of conjugal rights (Section 9) or judicial separation (Section 10) or nullity or annulment of marriage (Sections 11 and 12) or divorce (Section 13), the aggrieved party can claim for an interim maintenance. The quantum of maintenance under

Section 24 is generally 1/5th of the net income of the respondent, depending upon the circumstances of the case.

Permanent Alimony and Maintenance (Section 25): Section 25 of the Hindu Marriage Act provides for a permanent alimony and maintenance. An application under Section 25 may be made at the time of the decree under Section 9 or 10 or 11 and 12 or 13 of the Act. The relief under Section 25 is available to either the wife or husband. The relief is not available if the wife or husband has remarried or if the wife has not remained chaste or the husband has had sexual intercourse with any other woman.

Sections 24 and 25 of the Hindu Marriage Act, and Section 18 of the Hindu Adoptions and Maintenance Act do not stand in the way for invoking relief under Section 125 Cr.P.C.

C) Maintenance of Wife under Section 125 Cr.P.C.

Right to claim maintenance under Section 125 Cr.P.C. is a special provision applicable to all including the Hindu Wife.

Sections 125 to 128 of the Code of Criminal Procedure, 1973 lay down the provisions relating to the maintenance of dependent wives, children and parents.

Section 125 provides for the maintenance of wife, children and parents. Section 126 lays down the procedure followed in the proper court, which takes cognizance of the complaint under Section 125. Section 127 empowers the Magistrate to alter i.e. increase or decrease the amount of monthly allowance/maintenance (fixed by him earlier). Section 128 provides for the enforcement of the order for maintenance issued by the Magistrate.

The provision under Sections 125 to 128 serve a special purpose to avoid vagrancy and are applicable to all persons irrespective of their religion (all Indians). These provisions provide speedy, effective and extensive remedy against such persons who refuse/neglect to maintain their dependent wives, children and parents. A Magistrate of First Class on the proof of such refusal or neglect may order such person to pay certain sum of money (monthly/periodically or in lump

sum) towards maintenance. Previously, the monthly allowance fixed under the Code was 'not exceeding' five hundred rupees. Now, the Court/Magistrate has a discretionary power to fix the amount of maintenance, depending upon the circumstances of the case.

Section 125 Cr.P.C.: Section 125 of the Code empowers the Magistrate of First Class to order any person having sufficient means, neglects or refuses to maintain:

i) His legally wedded wife, unable to maintain herself;

ii) His minor son, legitimate or illegitimate;

iii) His unmarried daughter, legitimate or illegitimate of any age (whether a minor or major;

iv) His son or daughter, legitimate or illegitimate, of any age, who is physically or mentally disabled; and

v) His parents (both father and mother or father or mother) who are unable to live on their own.

to pay certain sum of money towards maintenance. The expression 'sufficient' means "does not mean only visible means such as real property or a particular employment". It refers to earning capacity of a person.

Section 125 Cr.P.C. is a statutory and mandatory provision. It runs as follows:

1. If any person having sufficient means neglects or refuses to maintain:

a) his wife, unable to maintain herself; or

b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself; or

c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself; or

d) his father or mother, unable to maintain himself or herself;

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married is not possessed of sufficient means.

[Inserted by Act No.50 of 2001, w.e.f. 24-09-2001 – Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within six days from the date of the service of notice of the application to such person.]

Explanation: For the purpose of this Chapter,

i) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

ii) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

2. Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance, or interim maintenance and expenses of proceeding, as the 'case may be'.

3. If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

4. No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

5. On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(**N.B.:** The expression 'not exceeding Rs.500/-' is no more as law at present).

This section provides speedy relief and protects the deserted/ neglected wife, children or parents from starvation and has nothing to do with conjugal rights.

Persons entitled to maintenance under Section 125 Cr.P.C.: As stated above, the following persons are entitled to claim maintenance under Section 125(1).

1. Wife.
2. Child, and
3. Parent (Father or Mother or Both).

For the purpose of Section 125 Cr.P.C. wife means a legitimate wife or legally wedded wife. It also includes divorced wife till she gets remarried. Section 125 Cr.P.C. is a special provision and it is applicable to the married women of all religions, viz. Hindu, Muslim etc. For the purpose of claiming maintenance under Section 125 Cr.P.C. the wife must be an 'abandoned wife' (i.e. husband left her without reasonable cause), but not an 'abandoning wife' (i.e. the wife, who left her husband without reasonable cause).

A Hindu married woman, who has been separated from her husband on reasonable cause, is entitled to claim maintenance under the following provisions, namely:

1. The Hindu Adoptions and Maintenance Act, 1956.
2. The Hindu Marriage Act, 1955, and
3. The Code of Criminal Procedure, 1973.

1. The Hindu Adoptions and Maintenance Act, 1956: Section 18(1) and (2) of the Act provides for maintenance. According to Section 18(2), a Hindu married woman, having sufficient means also is entitled to maintenance from her husband. According to Section 18(1) of the Act, a Hindu married woman living in the same roof along with the husband also is entitled to claim maintenance from her husband. Under this Act, employed, propertied and even those residing with the husband are entitled to claim maintenance.

2. The Hindu Marriage Act, 1955: According to Sections 24 and 25 of the Act, either of the spouses (i.e. either wife or husband) not having sufficient means to live on her/his own is entitled to claim maintenance from the other source. Section 24 provides for maintenance *pendente lite* (temporary relief) and Section 25 provides for permanent alimony and maintenance/permanent relief.

3. The Code of Criminal Procedure, 1973: Section 125 of the Code of Criminal Procedure, 1973, confers on married woman of any religion, right to claim maintenance from her husband, if he neglects or refuses to maintain her without any reasonable cause. It is a special provision and provides for speedy relief. It also extends to children and aged parents unable to live on their own.

According to this section, a married woman (wife) of any age or any religion who has been separated from her husband on reasonable cause and is not having sufficient means to live on her own is entitled to claim maintenance.

Conditions: To invoke relief (claim maintenance) under Section 125 Cr.P.C. by the married woman (wife) the following conditions are to be satisfied.

i) the marriage must be a legal one as per their religion;

ii) the wife must not refuse to live with her husband without reasonable cause;

iii) she must not be unchaste/live in adultery or remarried; and

iv) she must not live separately by mutual consent.

There is no period of limitation for filing an application under Section 125 Cr.P.C. The payment of maintenance comes into force with effect from the date of the order.

QUESTIONS AND HOW TO ANSWER

Q) Permanent Alimony (A.U. Nov./Dec. 2000, Part-A, Q.9, Marks: 4)

Ans. Sec.25 of the Hindu Marriage Act, 1955 provides for Permanent Alimony. Now write about it in brief.

Q) Explain right to take maintenance in Criminal Law and various personal laws with leading cases and also give a detailed note regarding permanent alimony.

Ans. Section **125** of the **Code of Criminal Procedure, 1973** provides for the right to take maintenance to (i) a married woman (wife) (ii) children; (iii) dependent parents.

The various personal laws, which provide for maintenance of a Hindu Wife are:

1) Section 18 of the Hindu Adoptions and Maintenance Act, 1955; and

2) Sections 24 and 25 of Hindu Marriage Act, 1955.

Sec.25 of the Hindu Marriage Act, 1955 deals with permanent alimony. Write now about maintenance under the above provisions with case law i.e. Shah Bano's case etc.

Part - III

The Hindu Minority and Guardianship Act, 1956

Lecture-VI: Minority and Guardianship

This lecture covers:

1. The Hindu Minority and Guardianship Act, 1956.
   - i) Object and Reasons.
   - ii) Salient Features (Changes brought about by the Act).
   - iii) Overriding effect of the Act.
2. Minor or Minority and Age of Majority.
   - i) Minority under Hindu Law.
   - ii) Minority under the Hindu Minority and Guardianship Act, 1956.
3. Guardian: Meaning and Definition.
4. Kinds of Guardians.

1. THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

The Hindu Minority and Guardianship Act is both a codifying and supplemental enactment. It was passed in 1956 and came into force from 25th August, 1956. It applies to the whole of India, except the State of Jammu and Kashmir (and also to Hindus domiciled in the territories to which this Act extends, who are outside the said territories). The Act deals with the law relating to Minority and Guardianship among Hindus. It contains 13 Sections. The Indian Majority Act, 1875 and the Guardians and Wards Act, 1890 are the other statutes, which deal with the minority and guardianship.

i) Object and Reasons:

1. This is another installment of the Hindu Code and it deals with the law relating to minority and guardianship.

2. Under the Indian Majority Act, 1875, a person attains majority on his completing the age of 18 years but if before the completion of that age he has a guardian appointed by the Court, he attains majority on completing the age of 21 years. That Act applies to all persons including Hindus but an exception is made with respect to the capacity of any person to act in the matter of marriage, dower, divorce and adoption. Marriage and divorce have already been dealt with so far as Hindus are concerned and the definition of minor in the Bill will ensure that the age of majority is 18 for all practical purposes.

3. Guardians may be divided into three classes, namely:

i) natural guardians.

ii) Testamentary guardians, and

iii) Guardians appointed under the guardians and wards Act, 1890 and the present Bill is supplemented to the guardians and wards Act, 1890, and deals with natural guardians and testamentary guardians incidentally abolishing *de facto guardians*.

(Published in the Gazette of India, Extra-ordinary, Part II, Sec.I, dated 27-8-1956).

ii) Salient features of the Hindu Minority and Guardianship Act, 1956 (Changes Brought about by the Hindu Minority and Guardianship Act, 1956):

The Hindu Minority and Guardianship Act 1956 was passed in 1956 and it received the assent of the President on 25th August 1956 (Sec. 1).

The provisions of this Act are, in addition to and not in derogation of, except as expressly provided in it, provision of the Guardians and Wards Act 1890 (Sec. 2).

Since the enforcement of the Hindu Minority and Guardianship Act, 1956, both the Hindu and Hindu Customs and usages and Guardianship and Wards Act 1890 will cease to have effect with respect to:

i) Any matter of which there is a provision made in this Act.

ii) So far as it is inconsistent with any of the provision contained in this Act.

iii) Overriding effect of the Act:

Section 5 of the Act gives over-riding effect. It provides that:

'Save as otherwise expressly provided in this Act:

a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

It will thus be seen that Section 5 of the Act repeals all existing laws, whether they are enactments or customs or ancient texts, if they are inconsistent with the Act.

However, the Act expressly retains principles of Hindu Law in operation relating to the following matters:

i) The natural guardianship of an adopted son.

ii) Testamentary guardians and their powers.

iii) Incapacity of a minor to act as guardian of any property.

iv) Non-appointment of a guardian for the undivided interest of a minor in joint family property.

v) The provisions laying down that the welfare of a minor shall be the paramount consideration in the appointment of a guardian.

2. MINOR OR MINORITY AND AGE OF MAJORITY

According to Manu, minority ends at the age of 16 years. Manu has stated that the king should keep the minor's estate under his custody so long his minority does not come to an end. In this way minority terminates at the age of sixteen.

There is, however, difference of opinion as to whether minority comes to an end at the completion of sixteenth year or at the beginning of sixteenth year. The view taken in Bengal school is that as soon as the sixteenth year begins minority ends. But according to the Mitakshara school particularly in Mithila and Banaras the minority terminates at the completion of sixteenth year. This view was at one time followed in Southern India and apparently in Bombay. This kind of difference in the opinions of commentators has come to an end in the present Act of 1959.

Section 4(a) of the Hindu Minority and Guardianship Act, 1956 defines, "minor means a person who has not completed the age of eighteen years". Similarly, according to Sec. 3 of the Indian Majority Act, 1875, "every person, who has completed 18 years of age is a major". In other words, a person, who has not completed 18 years of age is a minor". In case, any guardian is appointed by the court under the Guardians and Wards Act, 1890 to look after minor's person or property, the minority extends till attaining the age of 21 years. In England, a person below the age of 21 years was a minor till 1969. After the passing of the Family Reforms Act, 1969, the age limit for minority has been reduced to 18 years. Now, in England also, a person below the age of 18 years is a minor.

3. GUARDIAN: MEANING AND DEFINITION

The Law of Guardianship is based on the incapacity which the law attributes to minors and to persons who are deficient in mental capacity. Under Hindu Law a guardian means, a person having the care of the person of another or his property or of both, this was so because under Hindu Law the husband was the natural guardian of his wife as also of his minor child.

The term 'Guardian' has been defined in the Guardians and Wards Act, 1890 as follows:

'A person having the care of the person of a minor or of his property, or of both his person and property.'

Section 4(b) of the Minority and Guardianship Act, 1956 defines, "guardian" means a person having the care of the person of a minor or of his property or of both his person and property and includes:

i) Natural Guardian : According to Sec.4(c) of the Act, "Natural Guardian" means, any of the guardians mentioned in Sec.6 of the Act.

ii) Testamentary Guardian: A testamentary guardian is one, who is appointed by the will of the minor's father or mother.

iii) Guardian appointed or declared by a Court; and

iv) A person empowered to act as such by or under any enactment relating to any Court of Wards.

In *Rajalaksmi v. Ramachandan* (1967 Mad. 113), it was held that if a person donates property to a minor and appoints a guardian to look after the property he would not be a guardian with in the meaning of the Act (As he does not come under categories mentioned in Section 4(b)(i) to (iv) of the Act.)

4. KINDS OF GUARDIANS

According to Section 4 of the Hindu Minority and Guardianship Act, 1956, there are four kinds of guardians, namely:

i) Natural Guardian.

ii) Testamentary Guardian or Guardian appointed by Will.

iii) Guardian appointed/declared by Court, and

iv) Person empowered to act as guardian under any enactment of the Court of Wards.

In addition to the above, there are three more kinds of guardians, namely:

v) Defacto Guardian.

vi) Adhoc Guardian, and

vii) A Guardian ad litem.

i) Natural Guardian

A natural guardian is one who becomes so by reason of the natural relationship with the minor. In other words a natural guardian is a person having the care of the person of a minor or of his property or of both, by virtue of his natural relationship with the minor. Every relation of the minor cannot be natural guardian of the minor, although law does not restrict the list of guardians. The present Act, however gives list of natural guardians.

Under Section 4(c) of the Hindu Minority and Guardianship Act, 1956, 'natural guardian' means any of the guardians mentioned in Section 6. Section 6 of the Act states that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property).

Section 6 of the Hindu Adoptions and Maintenance Act deals with the Natural Guardian and Section 8 lays down the Powers of the Natural Guardian. It runs as follows:

'The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are:

a) In the case of a boy or an unmarried girl – the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the minor;

b) In the case of an illegitimate boy or an illegitimate unmarried girl – the mother, and after her, the father.

c) In the case of a married girl the husband.

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section:

a) If he has ceased to be a Hindu, or

b) If he has completely and finally renounced the world by becoming a hermit (vanaprstha) or an ascetic (yati or sanyasi).

Explanation: In this Section, the expression 'father' and 'mother' do not include a step father and a step-mother.

The following criteria is adopted for determining the guardianship.

a) In the case of a minor boy or an unmarried girl, father is the Natural Guardian. If the child is below the age of 5 years, mother is the Natural Guardian.

b) In case of an illegitimate boy or an illegitimate girl, mother is the Natural Guardian and after her, the father is the Natural Guardian.

c) In the case of a minor married girl, husband is the natural guardian.

In case of illegitimate children mother is the Natural Guardian, even though the father is known. If the mother has renounced the world or ceased to be a Hindu or dead or not capable of being the Natural Guardian, Father becomes Natural Guardian. Under the Old Hindu Law also the position is the same as above.

According to Section 7, in the case of an adopted child, adoptive father is the Natural Guardian. In the absence of father, adoptive mother is the Natural Guardian.

Restrictions (Section 6): A person cannot act as a natural guardian:

a) If he/she is ceased to be a Hindu; or

b) If he/she has completely and finally renounced the world by becoming a hermit (Vanaprastha) or an ascetic (Yathi or Sanyasi)

The expressions, father and mother under Section 6 do not include a step-father and a step-mother. The Madras High Court in:

Sundara Murthy vs. Shanmuganadar (1980) — held that, the mother cannot be a natural guardian so long as the father is alive. She can act as a guardian with the permission of the Court, if the father neglects or refuses to act as the guardian.

In *Varalakshmi v. Kanakadurga Prasad* (1989) 1 HLR 582(AP), it was held that the mother cannot be given custody though the child was less than five years where the minor was already living happily with father and it was not wise to disturb the existing state of affairs.

In *Mayamma v. Chikkanna* (1986) 1 HLR 384 (Kant), it was observed that the father and mother were separated for a long time, and the children were residing with the mother, and the father was neglecting the children and was not even paying maintenance and hence the court held that the mother was entitled to the custody of the minor children even though they were aged 10 and 7.

In *Mohini v. Virendra Kumar* (AIR 1932 Oudh 182), the supreme court decided that the mother is entitled to guardianship and custody of minor son of 11 years old in the interest of the welfare of the minor.

Powers of Natural Guardian (Section 8): Section 8 of the Act, deals with the powers of the Natural Guardian. Section 8(1) deals with the General Powers to do all acts which are necessary for the benefits of the Minor or his estate.

This Section imposes two restrictions on the Guardians.

1. The guardian cannot bind the minor by a personal covenant;
2. The guardian shall obtain permission of the Court in case of Mortgage, Transfer by sale of gift, Lease for a term exceeding 5 years or for one year or more beyond the date of attaining the majority.

These restrictions apply in case of the minor's separate or absolute property and do not apply to the movable property. Natural Guardian need not seek permission to acquire property for the Minor.

According to Section 8(3) if a Natural Guardian violates the above restrictions and deals with minor's property, such transactions (contracts) are voidable.

According to Section 8(4), when he transacts/contracts an immovable property of the minor, previous permission of the Court is necessary. Otherwise, it is voidable.

ii) Testamentary Guardian (Section 9)

Section 9 of the Act deals with testamentary guardian and their powers. It runs as follows:

a) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.

b) An appointment made under sub-section (1) shall have no effect if the father pre-deceases the mother, but shall revive, if the mother dies without appointing by will, any person as guardian.

c) A Hindu widow, entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.

d) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

e) The guardian so appointed by will has the power to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the

powers of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

f) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

Who may appoint? – The Act recognizes the right of the following persons to appoint guardian of the person and separate property of a Hindu minor:

1) The father, natural and adoptive.
2) The mother, natural and adoptive.
3) The widowed mother, natural and adoptive.

If a natural guardian, by executing Will, appoints a person to act as the guardian of the minor, such person is called 'Testamentary Guardian'. The father of a minor may appoint a testamentary guardian. Earlier, i.e. before passing of the Act, the testamentary guardian could function as per the will after the death of the testator (natural father) even though, the minor's mother was alive. But this position has been changed after the passing of the Act. Now, the mother survives as the natural guardian. Further, she can also appoint a testamentary guardian of her choice. (Before the Act, the mother could not appoint a testamentary guardian). In case of an illegitimate child, the mother also can appoint a testamentary guardian. Such testamentary guardian can function after the death of the testator (the mother of the illegitimate child) even though the father (putative father) is alive.

Under Section 10 of the Act, a minor shall not be appointed to act as guardian of the property of any minor. It is equally certain that a person who is of feeble mind or insane cannot be competent to act as the guardian of a minor, either of his person or property. Excluding these set of persons, there is nothing in the Act which limits the choice of a Hindu father or mother to appoint any person as the guardian under a will validly executed.

Powers: Section 9 of the Act deals with the testamentary guardian and his powers. Under the Hindu Minority and Guardianship

Act 1956, the testamentary guardian has all the powers of a natural guardian as restricted by the provisions of this Act and he has also to observe the conditions imposed on their exercise by the will.

Under the Old Hindu Law, father alone was competent to appoint a testamentary guardian. But in Modern Hindu Law, both the father and mother are competent to appoint a testamentary guardian. In case of illegitimate children, mother alone can appoint a Testamentary Guardian. In the case of legitimate children, father can appoint a Testamentary Guardian. Section 9(1) says, that father is entitled to act as a Natural Guardian. If he converts to another religion or becomes a sanyasi, it disqualifies him to act as a natural guardian, and hence, he cannot appoint a testamentary guardian.

In case of a minor married girl, her husband is the Natural Guardian. But, he cannot appoint a testamentary guardian since her father or mother can appoint.

Section 9(5) confers on Testamentary Guardian, to exercise all rights like a Natural Guardian. He (testamentary guardian cannot exercise the rights contrary to the will (testament). The permission of Court should be obtained to alienate an immovable property of the minor.

According to Section 10, a minor cannot act as the guardian of any other minor. Section 11 says that a *de facto* guardian is not entitled to dispose of or deal with the property of a minor.

Section 12 says that no guardian can be appointed for a minor's undivided interest in the Joint Family property. Finally, Section 13 provides that, the Court while appointing a guardian must give maximum consideration to the welfare of the minor.

iii) Guardian Declared/Appointed by Court

Where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, the court may make an order under the Guardians and Wards Act, 1890, appointing a guardian. In appointing or declaring a person as the guardian of a minor the welfare of the minor shall be the paramount consideration. This has been laid down in Section

13 of the Hindu Minority and Guardianship Act, 1956 and Section 17 of the Guardians and Wards Act, 1890. Section 13 of the Hindu Minority and Guardianship Act runs as follows:

13 (1) in the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

13 (2) no person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

In consideration as to what will be the welfare of the minor, the court shall have regard to the age and sex of the minor, the character and capacity of the proposed guardian and his nearness of kins to the minor, the wishes, if any of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor be old enough to form an intelligent preference, the court may consider that preference.

Who can apply for appointment as guardian? – The question of appointment by the court of a guardian can be considered on the application of:

i) the person desirous of being or claiming to be the guardian of the minor, or

ii) any relative or friend of the minor, or

iii) the Collector of the district or other local area in which:

   a) the minor ordinarily resides,

   b) the minor holds property, or

iv) if the minor belongs to a class, the Collector who has authority with respect to that class.

Powers of guardian appointed by the court: Powers of the guardian appointed by the court and the controls imposed by the Act over such powers are the same as that of a natural or testamentary guardian.

iv) Guardian under any other Enactments

Under Order 32 of Civil Procedure Code a guardian *ad litem* may be appointed or removed or where the management of an estate is vested, for the time being, in a Court of Wards, a guardian of the minor whose estate is so vested may be appointed under the provisions of the Court of Wards Act.

v) De facto Guardian (Section 11)

A *de facto* guardian of a minor, is neither a legal guardian, nor a testamentary guardian, nor a guardian appointed by the court, but he is a person, who himself, takes over the management of the affairs of the minor, as if he was a natural guardian. He is not an intermeddler, nor does an isolated act of any person in regard to child's property make him a de facto guardian. Some continuous course of conduct is necessary on his part. In other words a person having the care of properties of a minor but who is neither a natural guardian, testamentary guardian nor a guardian appointed by the Court is only a de facto guardian and the restriction under Section 11 will apply to his acts.

Section 11 of the Hindu Minority and Guardianship Act, 1956 deals with "De Facto Guardian". Section 11 of the Act, prohibits a `de facto guardian' to deal with minor's property. Section 11 runs as follows:

'After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of Hindu minor merely on the ground of his or her being the de facto guardian of the minor.'

The term 'de facto guardian' is a misnomer for the *de facto* manager of a minor's property. When a minor has no legal guardian, usually his near relation would look after his/her person and property. Such person may apply under the Guardians and Wards Act, 1890 for appointment as a guardian by the Court. If he does not apply for the appointment as a guardian and straight away takes possession and manages the property of the minor, he is called the "de facto manager or de facto guardian".

Section 11 of the Act brings about a material change in the law relating to de facto guardian or de facto managers of a Hindu minor's estate by enacting in express terms that after the commencement of the Act, no person has right or authority to do any act as a de facto guardian of such minor. There is in law nothing like a de facto guardian. The statute recognizes a natural guardian or a testamentary guardian, or a guardian appointed by the Court. Section 11 has done away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the de facto guardian of such minor.

vi) Ad hoc Guardian

When a person acts as guardian of the minor for temporary period or for a single transaction, he is called 'Guardian ad hoc'. He is not recognized as a *de jure* (natural) guardian. He is similar to *de facto* guardian. An *ad hoc* guardian does not find any place in the Act and any alienation of minor's property by him would be void.

In *Sri Aurobindo Society, Pondicherry v. Ramadass Naidu* (AIR 1980 Mad. 216), it was observed that 'the position in law of ad hoc guardians is that their acts are null and void and cannot bind the minor, although they are purported to be effected in the minor's interest, for ad hoc guardians are neither *de jure* nor *de facto* guardians.

vii) A guardian ad litem

A person is called as 'a guardian ad litem' who is appointed to defend an action or other proceeding on behalf of minor or person under a disability. He is not a *de jure* or *de facto* guardian.

QUESTIONS AND HOW TO ANSWER

Q) Who is a Testamentary Guardian (A.U, Model Q.P, Part-A, Q.6; and A.U, Nov. 2000, Part-A, Q.8; A.U, July 2000, Part-A, Q.6; and N.U, April 1999, Part-A, Q.7; Marks:4).

Ans: A guardian is one, who takes care of a minor's person and property. The guardian may be a natural guardian. (Eg.: Father or mother or husband) or a legal guardian (i.e. appointed by a Court).

A Testamentary Guardian is one, who is appointed by will/ testament by the natural guardian. (Write now in a paragraph about the testamentary guardian).

Q) What are the restrictions on the powers of a 'DEFACTO' guardian?

(N.U, Sept. 1999, Part-A, Q.10, Marks: 4).

Ans: Write meaning of guardian as stated above and then write about the De Facto Guardian in brief.

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Part IV

Lectures on
(The Law of Testamentary & Intestate Succession and The Hindu Joint Family)

Laws may be Personal Laws or Territorial Laws. Personal Law is applicable to a particular religion and hence, the people of different religions in our country are governed by their respective personal laws. For instance, in the matters of intestate succession, the Hindus are governed by the Hindu Succession Act, 1956; the Muslims are governed by the Muslim Law of Inheritance and so on. The Territorial Law on the other hand, is a law applicable to the people of the whole territory/country irrespective of their religion. *Eg.:* The Transfer of Property Act, 1882.

When a movable property is transferred from one living person to another living person, the law applicable to settle the disputes is, the Sale of Goods Act, 1930. Where an immovable property is transferred between two living persons (i.e. transfer inter vivos); the law applied is the Transfer of Property Act, 1882. Where devolution of property from a deceased person to living person/persons takes place, the law applied is the Law of Succession. In other words, when a person dies leaving properties behind, the properties are distributed among his/her heirs according to the law of succession. It is classified into two branches namely; 1. the Law of Testamentary Succession; and 2. the Law of Intestate Succession. When a person dies *in testate* i.e. died leaving a testate/will, the law applied is, the Testamentary Succession. If a person dies intestate i.e. without testate/will, the law applied is, the Intestate Succession.

The present subject, deals with the law relating to property relations or the Law of Testamentary and Intestate Succession and the Hindu Joint Family. Thus, it comprises of:

Part-I : The Hindu Joint Family

Part-II : Intestate Succession: (Hindus : The Hindu Succession Act, 1956).

Lecture-VII : The Hindu Joint Family

This lecture covers:

1. The Joint Hindu Family.
2. Members of Joint Family.
3. The Joint Family and Coparcenary.
4. Classification of property
   A) Joint Family Property or Coparcenary Property, and
   B) Separate Property or Self Acquired Property.
5. Effects of Section 6 of the Hindu Succession Act, 1956.
6. Effect of Section 6 of the Hindu Succession (Amendment) Act, 2005.
7. In nut-shell the changes which are brought by the Amending Act of 2005.
8. The Karta or The Manager.
9. The Doctrine of Pious Obligation.
10. Antecedent Debt or Vyavaharika Debt.
11. Partition of Joint Family Property.
12. Reopening of Partition.
13. Re-union.

1. THE HINDU JOINT FAMILY

The institution of the Hindu Joint Family has its origin in ancient texts and writings of Smritikars. It has evolved from the ancient patriarchal family and is described as the earliest unit of human society. A joint Hindu family, at best, may be defined by stating the jointness of members of whom it is made up. Thus 'it consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage and becomes a member of her husband's family.' The existence of a joint estate is not an essential

requirement to constitute joint family, there can be a joint family even in absence of an estate.

The Supreme Court observed that joint Hindu family is a larger body consisting of a group of persons who are united by the tie of Sapindaship arising by birth, marriage or adoption. The fundamental principle of jointness is Sapindaship. That it does not take more than one male to form a joint Hindu family with females. It may consist of a single male member and widows of deceased male members.

The Hindu Joint and undivided Family is an institution "sui generis". It is mostly governed by the Hindu religion and customary practices. Sociologically, the joint family system is found in the form of extended family system amongst the Muslims. But, nuclear, family is the most popular form amongst the Christians on the laws of Western Family Systems. Westerner never believed in living together. Therefore, the institution of Joint Family is confined only to the Hindus in India.

2. MEMBERS OF JOINT FAMILY

The following category of persons constitute joint family:

1. Persons, lineally connected in the male line.
2. Collaterals.
3. Any person related by adoption.
4. Dependants.
5. Son born out of marriage between a male Hindu and Christian woman under Special Marriage Act, 1954.

Females:

1. The wife or widows of deceased male members, and
2. Maiden daughters.

One of the special features of joint family is that it includes illegitimate children also. They are treated to be the members of their father's family. Sometimes married widowed daughters also settle in the joint family and are treated as members thereof, entitled to maintenance.

3. THE JOINT FAMILY AND COPARCENARY

Management of joint family: The affairs of a joint family are managed by the head of the joint family who is called the manager or 'karta'. The father, if living would generally be the 'karta' of the joint Hindu family. He is the representative of the family and is considered supreme in the management of the property.

There is a presumption that senior most member would be regarded as karta of the joint family.

Enjoyment of joint family property: Every member of a Mitakshara joint family has got certain rights, such as:

1. The right to maintenance and residence.
2. The right to have a partition.
3. The right to call for an account as incidental to the right, and
4. The right to joint possession and enjoyment.

The Hindu Joint Family is an institution *sui generis*. It is mostly governed by the Hindu religion and customary practices. It consists of Male, his wife, unmarried daughters and his male descendants, their wives and unmarried daughters.

Within the Joint Family, there is coparcenary. In other words, Coparcenary is a narrower body than the Joint Family. The Coparceners are the owners of the Joint Family property. It includes only those, who acquire by birth an interest in the joint or, as it is called, coparcenary property, these being the sons, grandsons and great grandsons of the holder of the joint property for the time being. In other words, only male members can be the coparceners. A woman cannot be a coparcener since she has no right to enforce the partition. The female members may be allotted shares, if partition takes place, but they cannot ask for partition. The head of the Joint Family is called the 'KARTA'. Every coparcener has a right of maintenance out of the joint family property. The coparcener is bound by the alienation made by the karta, and has a right to question/challenge the alienation made by the karta.

Coparceners are such persons who jointly inherit property, whereof they have unity of possession, which, however, may be severed at any time by partition. The co-heirs and their heirs also are called coparceners so long as unity of possession continues. Mulla defines coparceners as 'the three generations next to the holder in unbroken male descent.

Hindu Succession (Amendment) Act, 2005 has introduced changes of far-reaching importance in the concept of the Mitakshara coparcenary. The Amending Act has substituted Section 6 of the Hindu Succession Act. The substituted Sub-sectioin (1) of Section 6 now runs as below:

'On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara Law, the daughter of a coparcener shall:

a) by birth become a coparcener in her own right in the same manner as the son,

b) have the same rights in the coparcenary property as she would have had if she had been a son,

c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.

and any reference to a Hindu Mitakshara Coparcener shall be deemed to include a reference to a daughter of a coparcener.

Interest by Birth: The coparcener, acquires interest by birth in the joint family property. But, it is not fixed, but is subject to change with the birth of another coparcener.

Eg.: A coparcenary consists of a father 'F' and his son 'A'. If partition takes place 'A' gets 1/2 share and 'F' gets 1/2 share. Suppose, 'B' (another son) is born, before the partition; the share of the each coparcener comes down to 1/3. (i.e. F-1/3, A-1/3 and B-1/3).

According to Mitakshara Joint Family, every Coparcener gets right by birth in the Joint Family Property. He can claim partition. On his death, his interest devolves upon the other coparceners. An

illegitimate son cannot be a coparcener, but is entitled to maintenance out of Joint Family funds.

Before the Hindu Succession (Amendment) Act, 2005, Mitakshara Coparcenary consisted of only male members and females were not members of it. Hindu Succession (Amendment) Act, 2005 has substituted Section 6 of the Hindu Succession Act and has made the daughter of a Mitakshara coparcener, a coparcener in her own right in the same manner as the son. Now, she has the same rights in the Mitakshara coparcenary property as she would have had if she had been a son and is subject to the same liabilities in respect of the said coparcenary property as that of a son.

Before the Hindu Succession (Amendment) Act, 2005 the conception of a joint Hindu family constituting a coparcenary was common male ancestor with his lineal descendant in the male line within three degrees from such ancestor. Every copercenary started with a common ancestor which after his death could consist of collaterals only. The number of persons forming, for the time being the members of an undivided Hindu family, fluctuate both by births as well as by deaths in the family.

Coparcenary within the Coparcenary: Within the coparcenary, another coparcenary may exist. The existence of obstructed heritage and unobstructed heritage gives rise for the existence of a "coparcenary within the coparcenary".

For instance, a coparcenary consists of father 'A', his sons 'B', 'C','D' and two sons of 'C', 'E' & 'F'. 'C' died after acquiring some separate property. 'E' and 'F' inherit the separate property of 'C', which itself constitutes a separate coparcenary between 'E' and 'F'. `E' and `F' are also the members of the coparcenary consisting of 'A', 'B', 'D', 'E' and 'F'. Suppose a boy 'G' is born to 'E' or 'F', he becomes a member in both the coparcenaries.

Separate coparcenaries may exist with a coparcenary.

The Madras High Court illustrated the point in *Nachiappa v. Commissioner, Income Tax* [(1966) 2 Mad. 507), 'A' and his son

'B' constituted a coparcenary. Partition took place between them and they were assessed separately in income-tax. The sons born to 'B' will constitute a separate coparcenary. After sometime he reunited with his father 'A', he took the plea with the Income-tax authorities that the coparcenary with his son has come to an end and hence he would not be liable for paying income-tax on that front. The court rejected the agreement by saying that his coparcenary continued to have separate existence.

In *Bhagwan v. Reoti* (1962 SC 287), the Supreme Court observed – 'Hindu law recognizes only the entire joint family or one or more branches of that family as a corporate unit or units and that property acquired by that unit in the manner recognized by law would be considered as joint family property.... Coparcenary is the creature of Hindu law... This law also recognizes a branch of the family as a subordinate corporate body.'

The Indian Coparcenary resembles the Joint Tenancy of the English Law, which has the three features of the coparcenary viz. joint possession, right of survivorship and liability to partition.

Distinction between Joint Family and Coparcenary: Joint Hindu Family differs from that of the coparcenary in the following respects.

i) While a Joint Hindu Family is unlimited both as to the number of persons and the remoteness of their descent from the common ancestor, a coparcenary is open to only certain members of the joint family. It is limited to four degrees only.

ii) The joint Hindu Family does not show any difference between males and females, whereas coparcenary is limited only to males, that too for four degrees, inclusive of the ancestor or the head of the family for the time being.

iii) A Joint Hindu family shall constitute even after the death of the male/karta and consisting only females. But, a coparcenary may come to an end with the death of the last coparcener or the sole surviving coparcener.

iv) Every joint family is not a coparcenary but every coparcenary is a joint Hindu Family.

v) The membership of Joint Hindu Family is acquired by birth or by marriage and consists of all persons literally descended from a common ancestor and their wives and unmarried daughters. A coparcenary is, on the other hand, a much narrower body and includes only those persons who acquire by birth or in exceptional case of adoption of sons, an interest in the joint or coparcenary property, for example sons, grandsons and great grandsons of the joint property for the time being.

4. CLASSIFICATION OF PROPERTY

Under Mitakshara Law, property is divided into two categories, namely:

A) Joint Family Property or Coparcenary Property, and

B) Separate Property or Self Acquired Property.

A) Joint Family Property or Copercenary Property: Joint Family Property is a very important aspect of the Law of Hindu Joint Family, which is like a big reservoir into which property flows in from various sources to meet the needs of the members of joint family. It is also known as "Coparcenary Property or Unobstructed Heritage or Aprathibanda Daya". The word `Daya or Heritage' means "the property, which comes under the ownership of another by virtue of the latter's relationship to the owner". Aprathibanda Daya or Unobstructed Heritage is a "property in which a person acquires right by birth". It is called unobstructed, because the accrual of the right to it is not obstructed by the existence of the owner. Thus, property inherited by a Hindu from his father, father's father, or father's father's father but not through any of his other relations, is unobstructed heritage as regards his own male issue. In coparcenary property, all the coparceners have common interest and the right of possession.

The joint family property consists of the property inherited by a male Hindu from his male ancestor not exceeding three degrees

i.e. his Father; Father's Father; and Father's Father's Father (F; FF; and FFF). Similarly, his son; son's son and son's son's son (S; SS; and SSS) and separate property of the coparceners thrown into common stock. Share obtained on partition also comes under the joint family property. Son; son's son and son's son's son acquire an interest by birth in the joint family property.

Under the Mitakshara law as it existed before the Hindu Succession (Amendment) Act, 2005 joint family or ancestral property, in which the male issues, i.e. sons, grandsons and great-grandsons acquired by birth was called 'Apratibandha Daya' or 'unobstructed heritage'. Now, after commencement of the Hindu Succession (Amendment) Act, 2005 a daughter of a Mitakshara coparcener also acquires an interest by birth in the Mitakshara coparcenary property.

'A' inherits property from his father. 'A' son is afterwards born to him. The son becomes a coparcener with his father, 'A' by birth is entitled to an undivided half share in the property. The property in the hands of 'A' is unobstructed heritage, for the existence of the father is no obstruction or impediment or bar to the son acquiring an interest in the property. Similar would be the position of a daughter of 'A'.

Thus, the Joint Family Property consists of:

i) ancestral property;
ii) property jointly acquired by the members of the joint family;
iii) separate property of a member 'thrown into the common stock', with the intention of abandoning all separate claims on it;
iv) property acquired by all or any of the coparceners with the aid of joint-family funds.

B) Separate Property or Self Acquired Property: Property which is not joint is called separate or self-acquired property. A Hindu, even if he be joint, may possess separate property. He is the sole owner of such property and has exclusive possession and ownership over it. No other member of the coparcenary acquires any interest in it by birth.

Separate property is also known as "Obstructed Heritage or Saprathibandha Daya". Separate or self-acquired property of a person in which no right is acquired by birth, but acquired only on the death of the last owner is called 'Saprathibandha Daya' or 'obstructed heritage.' Property inherited by a Hindu male from those, other than the three paternal ancestors i.e. F, FF and FFF is called the `Separate Property'. It also includes property received by way of gift. Government grant income from the separate property and separate earnings. All relations other than the `Putra' (i.e. son, son's son and son's son's son) have only an obstructed heritage.

In the above illustration, if 'A' has no issue, but a separated brother only, the property in the hands of 'A' is obstructed heritage for the brother can acquire no interest in it until 'A's death. The existence of 'A' is an obstruction to the brother acquiring any interest in the property during 'A's lifetime.

According to Yajnavalkya – 'Whatever is acquired by the coparcener himself without detriment to the father's estate, as present from a friend or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property which has been taken away give it up to the coparceners; nor what has been gained of science'.

The Mitakshara text defines the separate property as an acquisition without detriment to the estate of either the father or the mother and the words 'without detriment to the father's estate' must be read along with each mode of acquisition mentioned in the text.

There are following incidents of separate property:

i) The separate or self-acquired property of a Hindu exclusively belongs to him.

ii) It makes no difference that he is joint owner.

iii) Even his male issues do not acquire any interest in it by birth.

iv) He may dispose it in any manner he likes.

v) It is not liable to partition and on his death it passes by succession to his heirs (if there is no testament).

vi) Rule of survivorship does not apply to the self-acquired property.

The following kinds of property are separate property in the hands of a male Hindu:

i) Property, movable or immovable, acquired by inheritance from any persons male or female, relation or stranger, provided such persons are not the three immediate male ancestors in separate property of that person.

ii) Property acquired by gift or will by a Hindu from any person, whatsoever, is his separate property.

iii) Property, which a Hindu acquires by purchase or otherwise, but not by means without the aid of family funds or 'without detriment to the father's estate' is his separate property.

iv) Property acquired by a coparcener as his share as a partition of joint family property would be separate property as far as the other members of the family are concerned.

v) Joint family property in the hands of the sole surviving coparcener would be separate as long as there is no other coparcener born or adopted or having a child in womb.

vi) Immovable property which a father recovers by purchase or otherwise and which property previously belonged to the joint family, is separate property to the extent of one-fourth, provided the fund of the purchase or acquisition has not been taken from the joint funds.

vii) Property comprising ancestral movables obtained as a gift from the father out of affection, provided that such gift is within reasonable limit.

viii) Property obtained by a Hindu under a grant from the Government unless it appears that the grant was made for the benefit of family and not exclusively to him.

ix) Ancestral property which has been lost to the family and which had passed into the possession of strangers and is recovered by a coparcener without the aid of other coparceners and of the coparcenary.

x) Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt.

xi) Gains of learning of science.

xii) Impartible property and savings from such property.

Distinction between Joint Family and Coparcenary: Following are the notable points of distinction between the Joint Family and Coparcenary.

Joint Family	Coparcenary
1. Both Males and Females are the members of the Joint Family	1. Only Male members are the members of the Coparcenary.
2. There is no limitation of degrees or generations with regard to the membership of the Joint Family.	2. Males upto 4 degrees (including senior most male) or generations from the senior most male members are the members of the coparcenary.
3. Some members ie. female members have no right by birth in the property.	3. All the members of the coparcenary have the right by birth in the property.
4. Certain Females like Father's wife, Mother, Grand mother etc. have no right to demand partition.	4. All the members have the right to demand partition.
5. Every Joint Family is not a coparcenary.	5. Every coparcenary is a Joint Family.

5. EFFECTS OF SECTION 6 OF THE HINDU SUCCESSION ACT 1956

It is true that Section 6 of the Hindu Succession Act, 1956 has intensely affected the entire concept of Mitakshara coparcenary and the rule of survivorship, but they have not been abolished. They have been modified to the extent of the proviso. In view of large number of female heirs in class I of the Schedule, it is generally not possible to find a family which does not have female relatives of class I, and thus gives a room to the rule of survivorship. As a matter of fact this situation will scarcely arise and hence it can be said that Mitakshara rule of survivorship has been given a mortal blow in the scheme of present Hindu Succession Act.

6. EFFECT OF SECTION 6 OF THE HINDU SUCCESSION (AMENDMENT) ACT 2005

The Hindu Succession (Amendment) Act, 2005 is a landmark, after 50 years, the Act, finally addressed some persisting gender inequalities in the Hindu Succession Act, 1956 which itself was path-breaking. The 2005 Act covers inequalities on several fronts – like agricultural land, Mitakshara joint family property, parental dwelling house and certain widow's rights. The major achievement lies in including all daughters especially married daughters as coparceners in joint family property. The 1956 Hindu Succession Act, distinguished between separate property and joint family property. The separate property of a (non-matrilineal) Hindu male dying intestate devolves, in the first instance, equally on his Class I heirs, namely, son, daughter, widow and mother (plus specified heirs of predeceased children). If previously governed by Dayabhaga, this rule applied also to joint family property. But, if previously governed by Mitakshara, a different rule applied. In the deceased man's 'notional' share in Mitakshara joint family property, the Class I heirs were entitled to equal shares. But the sons as coparceners in the joint family property additionally had a direct birth right to an independent share – while female heirs (e.g. daughter, widow, mother) had claims only in the deceased's 'notional' portion. Also, sons could demand partition while daughters could not.

The Hindu Succession (Amendment) Act, 2005 does not touch separate property. But it includes daughters as coparceners in the Mitakshara joint family property, with the same birth rights as sons to shares to claim partition, and (by presumption) to become Karta (Manager), while also sharing the liabilities. In addition, the Act makes the heirs of predeceased sons and daughters more equal, by including as Class I heirs two generations of children of predeceased daughters, as was already the case for sons.

7. IN NUT-SHELL THE CHANGES WHICH ARE BROUGHT BY THE AMENDING ACT OF 2005

In nut-shell the changes which are brought by the Amending Act of 2005 are the following:

i) The daughter is coparcener by birth in the same manner as the son.

ii) She has the same right in the coparcenary like a son.

iii) Her liabilities in Mitakshara coparcenary are like the liabilities of 'son' under the new Amendment Act, the Mitakshara coparcenary includes daughter also.

iv) The daughter and other females are now not only coparceners but they are also entitled to bequeath their share in the coparcenary like their male counterparts for this reason under Section 30 a change has been made.

v) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu Family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act, and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and, the daughter is allotted the same share as is allotted to a son.

vi) By the new Act in the list of heirs of Class I the following heirs have been added:

i) Son of pre-deceased daughter of pre-deceased daughter (Daughter-Daughter's Son).

ii) Daughter of the pre-deceased daughter of a pre-deceased daughter (Daughter's Daughter's Daughter).

iii) Daughter of pre-deceased son of pre-deceased daughter (Daughter's Sons's Daughter).

iv) Daughter of a pre-deceased daughter of pre-deceased son shall be added (Son's Daughter's Daughter).

vii) Due to change, the Act 2005 affected the pious obligation of son, son's son, son's son's son, to pay the debt of father's, grand-father's or great-grand-father's. The debt contracted before the 20th day of December, 2004 shall not be governed by the present law.

As given under the provision of Section 6(4) as substituted by the Amendment Act, 2005 the debts contracted after the commencement of the said Act cannot be recovered merely on the basis of pious obligation as given under Section 6(4) that no Court shall recognize any right to proceed against the son, grand-son and great grand-son for the recovery of any debt.

The separate property of the father, grand-father, great grand-father would be liable and the share of the father's would be liable, but coparcenary share would not be liable.

8. KARTA (THE MANAGER) (The Position of Karta or the Duties, Liabilities and Powers of Karta)

Karta is the Head of the Hindu Joint Family. He is also Known as 'The Manager'. He occupies unique position in the management of the Joint Family. The father or the senior most male member acts as 'Karta'. Even a junior most member can be a Karta, if the other male members (Coparceners) agree to it. A minor male (Coparcener) may also act as a Karta through his legal guardian till he becomes a major.

Can a Female be a Coparcener & Karta? (Imp. for Short Notes)

A woman cannot be a coparcener and hence, she cannot become the Manager/karta of the Hindu Joint Family. The relevant leading case on this point is:

Gangoji Rao vs. Channappa AIR 1983 Kant.222 — A, a father has a wife and two minor sons. A died leaving behind his undivided interest in the joint family property. The widow alienated the property. The alienation was challenged by the sons on the ground that a woman cannot be a karta and hence cannot alienate the property. The widow justified the alienation, contending that it was made by necessity. It was held that the alienation by the widow/mother in such situation is valid. But on appeal, the Supreme Court admitted the contention of the sons and held that a woman cannot be a coparcener and karta, following the decision in *Commissioner I.T. vs. G.S.M.Mills*, AIR 1966 SC 24.

The Position of Karta: The Karta, being the head of the joint family acts on behalf of the members of the joint family. The position of the Karta is "Sui generis". Sui generis in the sense that his position is not that of the Manager of a Commercial Firm and his relationship with the other members is not that of the principal and agent or Firm and partners.

Ojha J, in *Chandrakant vs. C.T.R* (AIR 1992 SC 66) viewed that there can be a partnership between Karta and other members. The karta may contribute capital, while the members may contribute labour and skill.

However, the powers of Karta are not absolute or unlimited. Within the ambit of his sphere, he possesses such vast powers, which no one can possesses.

Duties and Liabilities of Karta: Karta, being the administrator of the joint family, has a number of duties and liabilities.

1. He is responsible to maintain all members of the joint family. If he fails to do so, any member can sue him for the maintenance and can also recover the arrears of the maintenance.

2. He is responsible to perform the marriages of all the unmarried members, particularly, the female members (daughters).

3. He has to prepare the accounts if a suit is filed by a coparcener for partition.

4. He is bound to pay taxes and all other dues on behalf of the joint family.

5. Finally, he may be sued for failure to discharge the above duties and obligations.

Powers of Karta: The Powers of Karta in joint family property are not larger than a coparcener in the family nor has the Karta larger right to enjoy the same than any other coparcener. He does not get any remuneration for the services he renders in family. The powers of Karta are categorised under the following heads:

1. Power of Alienation
   - i) Legal Necessity.
   - ii) Benefit to the Estate, and
   - iii) Indispensable Religious Duties.
2. Other Powers
   - i) Power over income and expenditure.
   - ii) Power to manage joint family business.
   - iii) Power to contract debt for family prupose.
   - iv) Power to enter into contracts.
   - v) Power to refer to arbitration.
   - vi) Power to enter into compromise.
   - vii) Power to give discharge.
   - viii) Power to acknowledge debts.
   - ix) Power to represent in suits.
   - x) Power of alienation of joint family property.

1. Power of Alienation: 'Alienation' means "transfer of property from one person to another by way of a sale, gift, lease,

mortgage etc". Karta can alienate the joint family property with the consent of the other coparceners. Even without the consent of the other coparceners, he can alienate under the following cases:

i) For the purposes of Legal Necessity.

ii) For benefit to the Estate; and

iii) For the performance of Indispensable Religious Duties.

i) For the purpose of Legal Necessity: The expression 'legal necessity' is generally used to signify the causes for which, or the circumstances under which a single member of a joint family, or a like person, having a limited interest in property is authorized to transfer it so as to pass to the transferee a right to the entire property. The term 'legal necessity' has to be read in a wider connotation. It is to be interpreted with due regard to the conditions of modern life.

The karta can alienate the joint family property for the purposes of legal necessity. This view was laid down in Hanuman Prasad's Case (6 MIA 393):

It was laid down that the alienation of joint family property by karta is justified, if it is made for the purposes of legal necessity, which includes maintenance of the members of the joint family, payment of Government revenue, marriage expenses of the coparceners and their children, payment of family debts etc.

In *Basava Raj vs. Kushal Chand*, AIR 1992 Kant.393 — It was held that, an alienation made by the Karta without any legal necessity and without adequate consideration is not binding on the joint family.

The following have been held to be legal necessities –

i) Payment of Government revenue and debts payable out of family property.

ii) Maintenance of coparceners and their family members.

iii) Marriage expenses of coparceners and daughters of the coparceners.

iv) Performance of Shraddha, funeral and other religious ceremonies of the members of joint family.

v) Expenses of necessary litigation.

vi) Costs of defending the head of the family or any other member of joint family against serious criminal charge.

vii) Payment of debts incurred for family business.

viii) Expenses for augmenting the means of livelihood of the members of the family.

ix) Cost of building a residential house for the family and expenses for repairing the family house.

x) Sale of family property with the object of conveniently adjusting the shares of the rest of the family.

xi) Sale of family property for migrating to different place for better living.

ii) For Benefit to the Estate: An alienation of joint family property can be effected for the benefit to estate also. The Privy Council has elaborately illustrated as to what are the incidents of benefit to estate in *Palaniappa v. Devsikmony* . It laid down that 'the preservation', however, of the estate from extinction, the defence against the hostile litigation affecting it, the protection of it or its portion from injury or deterioration by inundation, these and such like things would obviously be the benefits.

The manager of a joint Hindu family has an implied authority to do whatever is best for all concerned, the test being whether the transaction was one which a prudent owner would have carried out with the knowledge available to him at the time and such transactions are justifiable on principle of benefit to the estate and are not limited to transactions which are of a defensive nature.

In *Gollamudi Shiva Kumar v. Indian Overseas Bank* (AIR 1978 AP 37), the Andhra Pradesh High Court observed – The karta of a joint family can burden the estate by mortgaging the property for the benefit of the estate. However, in doing so, he must act as

a prudent owner with the knowledge available to him at the time of transaction. A transaction by the manager which is neither risky nor speculative but calculated to confer a positive advantage on the family, can be said to benefit the estate. But what transaction would be for the benefit of the family must necessarily depend upon the facts of each case. Where the karta who was running a hotel business mortgaged the family property with a view to raise funds for renovation and reconstruction of the hotel building, it was held that the transaction was for the benefit of the estate.

In broad sense legal necessity includes 'benefit to estate'. It includes protection of the estate from extinction, deterioration, litigation etc. An alienation made by Karta for benefit to the estate is justified.

The following have been held to constitute benefit of estate justifying alienation of joint Hindu family property:

i) An advantageous acquisition of some property made in the interest of the family.

ii) Sale of small shares in inferior land in three different villages to acquire a compact share in a fertile land in one village.

iii) A sale of joint-family property which is inconveniently situated and is unproductive for the purpose of investing the purchase money in another property which is sound investment.

iv) Sale of lands situated in an unhealthy place for the purpose of buying lands in advantageous locality.

v) A mortgage for the purchase of a residential house which was also used for carrying on business.

vi) Sale of dilapidated house belonging to the family which did not fetch rent and the municipal committee wants to pull it down.

vii) Sale of property yielding small income and difficult to manage for extension of the existing family business.

viii) Sale of property yielding no profit in order to purchase land yielding more profit.

ix) A mortgage of a family tea-garden for the purpose of

maintaining the garden and a factory which was the source of income to the family.

x) A mortgage for making additions to and improvement in the family house.

iii) For the performance of Indispensable Religious Duties: Karta can alienate the joint family property to discharge the religious duties like 'Sradda' ie. offering of Pindas and Udakas to the manes of ancestors.

Further, karta may make a gift of the joint family property to a reasonable extent (*Guramma vs. Mallappa*, AIR 1964 SC 510).

Ramalinga vs. Siva Chidambara, 42 Mad. 440 — In this case, gift of a coparcenary immovable property made by karta for the pious purpose ie. to a temple on occasion of the father's funeral was held valid.

Ammathayee vs. Kumaresan AIR 1967 SC 569 — In this case, gift made by the father to his daughter towards her maintenance from the joint family property was held valid.

2. Other Powers: The other powers and rights of Karta are detailed below:

i) Power over income and expenditure.

ii) Power to manage joint family business.

iii) Power to contract debt for family purposes.

iv) Power to contract.

v) Power to refer to arbitration.

vi) Power of compromise.

vii) Power to give discharge.

viii) Power to acknowledge debts.

ix) Power to represent in suits.

x) Power of alienation of joint family property.

i) Power over income and expenditure: The karta has

control over the income, expenditure and is the custodian of the surplus, if any. He is not bound to economise or save like a trustee or agent, so long as he spends the income for the purpose of the family, that is, for maintenance, education, marriage, sraddha and other religious ceremonies of the coparceners and of the members of their respective families.

ii) Power to manage joint family business: The karta has the power to manage the joint family business. In this respect he can take all such steps which are just and necessary for the promotion of the business.

iii) Power to contract debt for family purpose: The karta can enter into contracts incurring debts for family purposes and family business which will bind the other coparceners to the extent only of their interest in the joint family property. Such debt contracts could bind the adult coparceners personally also if they were parties to the contract expressly or impliedly or they subsequently ratify the contract and in case of minors if they ratify on attaining majority.

In case of a loan advanced to the marriage, if the lender makes due inquiry into the necessity for the loan and lends the money bona fide, the debt is binding on the interests of all the members although the reasonably credited necessity did not in fact exist.

iv) Power to contract: The karta has the power of making contracts, giving receipts and compromising or discharging contracts ordinarily incidental to the business of the family.

v) Power to refer to arbitration: The karta may refer to arbitration any matter involving the interest of joint Hindu family and the other members of the family, including minors, are bound by the reference and consequently, by the award made upon it.

vi) Power of compromise: The karta has, however, no power to give up a debt due to the joint family and to give up a valuable item without any return or consideration, though he has a right to settle accounts with the debtors and to make a reasonable reduction either towards interest or towards principal in the interest of the family.

vii) Power to give discharge: The karta has power to give a valid discharge to the debt due to joint family. Where one of the members of joint family is a minor, he cannot claim the benefit of Section 7 of the Limitation Act.

viii) Power to acknowledge debts: The karta has power to acknowledge a debt or make a part payment of it, so as to extend the period of limitation. But he cannot execute a fresh promissory note or a bond so as to revive a time barred debt.

ix) Power to represent in suits: The karta may represent the joint family in the event of a suit by or against the family, so that other members are not the necessary parties to the same. The karta himself be sued or he can institute a suit with respect to any property or other matters of the joint family. Whenever a decree is passed against him, that would bind all other members of the family, if, as regards minor members, he acted in the litigation in their interest, and in case of major members, he acted with their consent.

The karta represents the interests of the joint family property also. In *Fathiunnisa Begum v. Tamirasa Raja Gopala Charyulu* (AIR 1977 AP 24), the Court observed that a Hindu widow inheriting her husband's share under Hindu Women's Right to Property Act, 1937, does not by itself disrupt the joint family status. After such inheritance she continues to be a member of the joint family and the karta of joint family can represent her in all suits. The enlargement of her limited estate into full estate by virtue of Section 14 of the Hindu Succession Act does not bring about a change in the karta's power to represent joint family including her.

x) Power of alienation: The karta can alienate for value the joint family property so as to bind the interests of the other coparceners provided it is made:

a) with the consent of all the existing coparceners, they being all adults;

b) for legal necessity, or

c) for the benefit to the estate.

9. DOCTRINE OF PIOUS OBLIGATION

'Pious' means 'godly, religious, devout, reverential. 'Pious Obligation' means duty of a Hindu due to deep devotion to religion. Hindu law states that 'He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor's house a slave, a servant or a woman or a quadruped'. As per Hindu scriptures, it is the holy duty of a son to pay off or discharge his father's debts. The religious obligation is attached to the son as well as grandson and to the great grandsons also, on the ground that all the three are coparceners with others by their birth.

It is said that non-payment of debts is a sin and also a crime. Any person, who died leaving the debts behind cannot go to heaven. The 'putra' i.e. the son, son's son and son's son's son by repaying/ clearing off such debts, discharges his parted father/ancestor from the indebtedness and enables/facilitates him to reach the heaven. This duty or obligation of a son to repay the debts of the deceased father (parted ancestor) is rested upon a special doctrine, known as *"The Doctrine of Pious Obligation"* - However, this obligation extends to non-avyavaharika (or vyavaharika) debts only. Avyavaharika debt is one, which is taken for illegal or immoral purpose. Eg:- Gambling, Races etc.

The Supreme Court in – *Anthony Swamy v. M.R.Chinaswamy Koundan* (AIR 1970 SC 223), the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both these conceptions are correlated. The liability on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counter balance to the principle that the son from the moment of his birth acquires along with his father an interest in the joint family property. The doctrine is in consonance with justice, equity and good conscience.

Again in *Venkatesh Dhonddev Deshpande v. Son, Kusum Dattatraya Kulkarini* (AIR 1978 SC 1791), the court observed that

where the father as karta contracted the debts for family purposes, the sons as members of the family are bound to pay the debts to the extent of their interests in the coparcenary property.

Under Old Law, the doctrine (obligation to discharge the debts) arises after the death (of the father). But, according to the modern doctrine (new law) the obligation arises even during the life time of the father *(Brij vs. Mangal Prasad,* 46, All. 951 (PC). Further, under the old law, the son had an ogligation to pay the debts with interest. The grandson was liable for the principal amount only (i.e. without interest). The great grand-son was not liable, unless he had received the property from the ancestor. But according to the modern doctrine/ law all i.e. son, son's son and son's son's son are liable to pay the debts with interest.

When the father being the Karta/Manager of a Hindu Joint Family contracts a loan for legal necessity, the loan is binding on all the members of the joint family. If he incurs debts for his personal purpose, he is personally liable. To clear off such debts, he may have to alienate his personal property or his son's property. In case, his son's property is alienated, his son should not question him.

Application of the Doctrine in respect of Polyandry: If a man has more than two wives, it is called 'polygamy'. Similarly, if a woman has more than two husbands, it is called 'polyandry'. As there are several husbands to the same woman, the present father, who died of indebtedness may not be real/ actual father of the son and hence, the question is, whether the `Doctrine of Pious Obligation' is applicable to the Thiyyas of Calicut in Kerala State?

The Kerala High Court answered this question in affirmative in:

Robini vs. Sethumadhavan, AIR 1978 Ker. 119 (FB) — that the doctrine is applicable to the Thiyyas also. Further, the doctrine of pious obligation as recognised in old law (Dharma Shastras) has been applied in modern law/decision also.

Debts outside the scope of the Doctrine (Old Law & New Law):

1. Commercial Debts;
2. Suretyship Debts;
3. Gaming Debts; and
4. Avyavaharika Debts

1. Commercial Debts: Commercial debt was regarded outside the doctrine, according to old law. According to the present law, it is within the doctrine (i.e. the son is liable to clear commercial debt).

2. Suretyship Debts: Liability arising out of suretyship by the father is not binding on his son. Hence, it does not come within the doctrine.

3. Gaming Debts: Gaming debts are outside the doctrine as per the Old and New Laws. Eg.:— Debts incurred for drinks, liquors etc.

4. Avyavaharika Debts: According to the Mitakshara, it is outside the doctrine. Cole Brook translated it as *"a debt for a cause repugnant to good morals"*. In other words, it is a debt for an illegal or immoral purpose.

10. ANTECEDENT DEBT OR VYAVAHARIKA DEBT

Meaning: The term 'Vyavaharika' is a Sanskrit word, which means 'a normal activity of a normal person. The expression vyavaharika debt means 'a debt, which is legally binding'. Vyavaharika debt is also known as 'Antecedent Debt'. The word *'Antecedent'* means *"prior or previous"*. The expression 'Antecedent Debt' denotes a debt antecedent in fact and in time as well. It aims to protect the interest of the third person.

Mohammedan Law prohibits lending of money for interest and hence it is void. Whereas Hindu Law permits lending and borrowing for interest and hence it is valid. Hindu law enunciates that, 'he, who having received a sum lent or the like does not repay it to the owner (lender) will be born hereafter in his creditor's (lender's) house a slave a servant, a woman or a quadruped.'

Karta as a head or manager of the joint family is empowered to alienate i.e. to sell or mortgage the joint family property including the sons' interest therein to discharge a debt contracted by him for his own personal benefit, such alienation is binding on the sons provided the following conditions are satisfied:

i) the debt is antecedent; and

ii) it was not contracted for an immoral purpose.

The very object of the doctrine of 'Antecedent Debt' is to protect the interest of the third person (lender/creditor), who advanced/lent a sum of money to the karta of a joint family.

Eg.: 'A', the father of a Hindu Joint family borrowed Rs.50000/- from 'B', a money lender for his personal use and mortgaged later, a joint family property. If, it is not proved that the amount is used for immoral purpose, the mortgage debt binds not only the father (A)'s interest but also his sons' interest in the property. In this case, the debt is antecedent of the mortgage in fact as well as in time.

Brij Narain vs. Mangal Prasad, 46 All. 951 PC — In the instant case, the father alienated a part of the joint family property, by executing a mortgage deed. Later, he executed a second mortgage deed on the same property for the interest accrued on the principal amount. In an action by the creditor (Mortgagee) of the second mortgage, it was held that the debt was antecedent to the second mortgage and binding on the sons.

11. PARTITION OF JOINT FAMILY PROPERTY

Meaning: Partition is a process by which the joint status is put to an end. In other words, partition means division of the Joint Family. It refers to both the property and status.

The Mitakshara says that 'Partition is the adjustment of diverse rights regarding the whole, by distributing them or particular portions of the aggregate'. Thus, according to Mitakshara Law partition has two distinct meanings. In the first place it means 'the adjustment into specific shares the diverse rights of different members according to the whole of family property'. In the second place, it means 'the

severance of the joint status with the legal consequences resulting therefrom'. Partition under Mitakshara law may be defined as, 'the crystallization of the fluctuating interest of a coparcenary into a specific share in the joint family estate.' According to Mitakshara, the ownership of each coparcener in an undivided family extends over the whole of the joint property and each part thereof.

According to Mayukha, partition is only a particular condition of the mind and mere intention to separate constitutes partition. It is a process whereby members of a joint or reunited family becomes separate and cease to be coparceners and become tenants-in-common. The question whether the status of the family is altered or not is a question of intention of the parties to be inferred from the instruments they have executed or the acts they have done to effect such division.

The subject matter of partition is coparcenary property. Separate property, properties like dwelling house, idols, temples etc. are not subject to partition.

If partition takes place between the father and sons, provision should be made for the discharge of joint family debts. Similar provision should be made for maintenance, marriage expenses of the female members.

Property liable for partition: It is only the coparcenary property which is subject to partition. The separate property is not liable to partition at all, as it belongs absolutely to the owner thereof.

Secondly, the property, to which the law of primogeniture applies, cannot be divided, e.g. a Raj. Nor can family idols and places of worship be divided. Similarly, there are certain properties indivisible by their nature, e.g. animals or furniture etc. Their value is determined and distributed among the coparceners and some of those properties may be enjoyed jointly by them or by turns.

Thus, the following properties are not liable to partition:

i) Impartible estate i.e. property which descends to one member only, either by custom or under any provision of law or by terms of grant.

ii) Property indivisible by nature, e.g. ponds, staircase, passage.

iii) Family idols and relics which are object of worship.

iv) Separate property of a member.

v) The places of worship and sacrifice or the property, which has been dedicated to religious and charitable purposes.

vi) The well and the right to draw water from the well.

vii) The ornaments and the dress materials given to the wives of the coparceners.

viii) The headship of a Math.

According to Manu, 'a dress, a vehicle, ornaments, cooked food, water and female slaves, property destined for pious use and sacrifices, and a pasture land are indivisible'. Vijnaneswara expounding the texts or Smritis said, 'water or a reservoir of it, as a well or the like, not being divisible, must not be distributed by means of the value, but is to be used by the co-heirs by turns'.

'The common way, road of ingress to and egress from the house, garden or the like is also indivisible'.

Thus there may be several kinds of properties indivisible by nature in respect of which an agreement has to be reached so that they remain in the common use of all coparceners. For example, stair case, courtyards, tanks, roads, right of way and the like, are incapable of valuation or division.

Provisions to be made before partition: Some provisions must be made out of the property liable to partition before any partition is effected.

i) Debts incurred for joint family which are payable out of the joint family property, provided they have not been contracted for immoral or illegal purposes.

ii) Personal debts of the father not incurred for illegal or immoral purposes.

iii) Maintenance of dependent female members and disqualified heirs.

iv) Marriage expenses of unmarried daughters of the last male holder but not of the collaterals.

The amount of expenses must be commensurate with the wealth of the family. There is no need for making provisions for the marriage of unmarried coparceners. The Madras High Court in a case has held that where the marriage of a daughter is performed after filing a partition suit but before the finalization of said suit, the amount spent for the marriage of daughter is recoverable from the joint family property.

v) Expenses for funeral ceremony of the widow and the mother of the last male-holder.

After the above provision has been made out of the property liable to partition, an account must be taken of the joint family property in the hands of the manager and other members of the family. No charge will be made against a coparcener on account of the fact that a large share of the family income was spent on his family in consequence of having a large family to support.

The Supreme Court in *K.N.Narayanan v. K.V.Ranganathan* (AIR 1976 SC 1715), held that while dividing the family estate, it is necessary for the joint family to take account of both the assets and the debts, for which the undivided estate is liable and to make provision for discharge of the debts. Where property is given to a member in lieu of his personal undertaking to discharge the debts of the joint family, the Court is to recognize and sustain it. By the aforesaid arrangement other members were absolved of the responsibility to discharge family debts.

The following points are notable in connection with the partition of the joint family:

i) There should be an expression of distinct intention.

ii) Division by metes and bounds is not necessary.

iii) The existence of property is not necessary.

iv) There is no need of telling the reasons of severance.

v) The presence of minors will be no hindrance in partition.

Right to ask partition: Every coparcener in a Joint Family has a right to ask for partition. No female member can ask for partition. However, certain female members viz. father's wife, mother and grand-mother are entitled to shares, if partition takes place.

Who can claim: Following persons are entitled to claim partition.

1. Father

2. Son, Grand-Son and Great Grand-Son: According to Mitakshara, they have right to partition. They do not have such right in Dayabhaga.

3. Minor Coparcener: Minority is no bar to claim partition. Even a child in mother's womb is entitled to share in the partition. If partition takes place without allotting share to the child in womb, he is entitled to reopen the partition after the birth.

4. Adopted Son: He gets all rights like a naturally born son. If a widow (of the deceased coparcener) adopts a son after partition, he can reopen the partition (doctrine of relation back).

5. Illegitimate Son: He has no right to ask/claim partition but is entitled for maintenance. On the death of his father, he survives as a coparcener along with the legitimate son. Then, he can claim partition.

6. Wife: A wife cannot claim partition. If partition takes place between her husband and sons, she is entitled to a share equal to that of her son.

7. Widow Mother: She cannot ask for partition, when partition takes place between her sons, she gets equal share. If she received any sthridhana from her husband or father-in-law, it is to be deducted from her share.

8. Grand-Mother: She cannot ask for partition. If partition takes place between/among her son's sons, she gets equal share to that of her son's son.

Allotment of Shares or Rules of Shares:

1. Partition between Father and Sons: If a partition takes place between Father (F) and his two Sons S1 and S2, each gets equal Share. Then the share is: F = 1/3, S1 = 1/3 and S2 = 1/3.

Previously the law had been that the eldest son could be given double share for he used to perform the Pindadana, etc. But this law is no more recognized. In *Panchanan Naik v. Balur Singh Naik* (AIR 1972 Orissa 85), the Orissa High Court relying upon the view of the Supreme Court in *Sriomani v. Hem Kumar* (AIR 1968 SC 1299), laid down that in a suit for partition between the father and sons, the eldest son is not entitled to Jyesthansa unless the custom established otherwise. Jyesthansa is given mainly on the ground that the eldest brother offers pinda to the ancestors including the deceased father. When the father is alive there is no sense in giving Jyesthansa to the eldest son and such a custom is not recognized in law.

The Orissa High Court in *Hare Krishna Sahu v. Bhagirathi Sahu,* has laid down that mere Jyesthansa, as such de hors of any other consideration has no sanction of law but inequality of shares should not be equated with Jyesthansa to afford a ground to impeach deed otherwise valid. There may be various reasons why any member is given a bigger share.

2. Among Brothers: On the partition between brothers, each takes equal share to the other except in the present of contrary custom e.g. 'Jyestha-bhaga'. Earlier, the law had been that the eldest son could be given double share because he used to perform the pinda dana etc. But this law is now no more a good law. In *Seromani v. Hem Kumar* (AIR 1968 SC 1299), the Supreme Court observed that in a suit for partition between the father and sons, the eldest son is not entitled to Jyesthansa unless the custom established otherwise because Jyesthansa is given mainly on the ground that the eldest brother offers pinda to the ancestor including the deceased father. When the father is alive, there is no sense in giving Jyesthansa to the eldest son and such a custom is not recognized in law.

3. Per. Stripe Rule: If partition is made among branches, property is divided equally among the branches. Each branch takes

per stripes according to branches as regards every other branch and the members of each branch take per capita (according to an individual) whether they are by the same wife or by different wives.

4. In case wherein the father is dead the property must be divided equally among the brothers and their mother (or mothers together) if alive.

5. On the death of a coparcener leaving issues, his right to share on partition passes to his widow and his male issues, provided that each issue be within the limits of coparcenary i.e. within the fourth degree from the common ancestor.

6. If some persons belonging to one branch separate themselves and the remaining members of all the branches continue joint then, at a subsequent partition:

a) according to the Bombay High Court regard must be given to the state of the family at the subsequent partition;

b) according to the Madras High Court, however, shares previously allotted to the separating members shall be debited against their branch i.e. at the subsequent partition, the shares should be allotted with reference in the situation at the time of the earlier partition.

However, according to the Hindu Succession Act, 1956 under Section 6(1)(a), on and from the commencement of the Hindu Succession (Amendment) Act, 2005 (i.e. 20-12-2004) in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and according to sub-section (b), have the same rights in coparcenary property as she would have had if she had been a son and any reference to a Hindu Mitakshara Coparcener shall be deemed to include a reference to a daughter of a coparcener.

Female Shares: The females, who take a share on partition are: (1) the wife, (2) widowed mother (3) widowed grandmother, and (4) daughter.

But in the Madras state, the practice of allotting a share on partition to females has become obsolete. These female sharers cannot

demand a partition, their right extends only to get a share in case the male coparceners come to a partition. The following are the rules of allotment to females:

i) On partition between the father and his children, the wife takes a share equal to that of the children.

ii) On the partition between sons after the father's death, the mother also receives an equal share. She gets a share even if partition is between her sons and the purchaser of the interest of one of them. In case, there are sons by different mothers and more than one mother is alive, the rule is to divide the property into as many shares as there are sons and then to allot to each surviving mother a share equal to that each of her sons in the aggregate portion allotted to them.

iii) Under the Mitakshara Law, the paternal grandmother would be entitled to a share only if the partition is between her grandchildren, her own children being dead, or between collaterals, such as, her son and her grandson by a predeceased son, i.e. between an uncle and a nephew.

iv) Daughter – Daughter of a Mitakshara Coparcener is now a coparcener after the commencement of the Hindu Succession (Amendment) Act, 2005. Therefore, she stands on equal footing with the sons of the coparceners and can demand a partition and a share equal to that of a son on the partition being effected.

Partition how effected: Partition may take place or may be effected in the following ways:

1. By filing a suit;
2. By an agreement between/among the coparceners; and
3. By arbitration

Effects/Consequences of Partition: By partition, coparcenary is dissolved. Member's share becomes separate property. On his death, his property devolves upon his heirs.

12. REOPENING OF PARTITION

A text of Manu runs:

Once is the partition of inheritance made; once is a damsel given in marriage; and once does a man say, "I give"; these three are by good men done for once and irrevocable.

On the basis of the above text, a view has been propounded that if partition is once made, it is final and irrevocable and hence, it cannot be re-opened. However, a partition can be re-opened in the following cases:

1. Fraud;
2. Son in womb;
3. Adopted son;
4. Disqualified coparceners;
5. Son conceived and born after partition;
6. Absentee coparcener; and
7. Minor coparcener.

1. Fraud: If the partition is found fraudulent, it can be set-aside and the person injured can claim reopening of the partition. For instance, worthless assets are fraudulently misrepresented as valuable assets and are distributed to a coparcener, he has a right to claim the reopening of partition.

2. Son in womb: At the time of partition, if a son is in womb, and no share is reserved for him, he can get the partition reopened.

3. Adopted son: If a widow of a coparcener adopted a son after the partition, the adopted son is entitled to re-open the partition.

4. Disqualified coparcener: A disqualified coparcener is one, who is deprived of his share at the time of partition due to some disqualification/technical constraint. After the disqualification is removed, he can get the partition removed.

5. Son conceived and born after partition: Where a father does not take share on partition and a son is begotten and born to him, the son can reopen the partition.

6. Absentee coparcener: Where a coparcener is absent at the time of partition and no share is allotted to him, he can get the partition reopened.

7. Minor coparcener: A minor coparcener can claim reopening of the partition, if he can establish that the partition, which was effected during his minority was unjust, unfair and prejudicial.

13. RE-UNION

Meaning: When partition takes place in a Hindu Joint Family, coparcenary gets dissolved and the coparceners have to live separately and individually. After partition, if any two or more members of such joint family/ coparcenary reunite together and combine their estates, it is called 'Re-union'.

According to Brihaspati, "He who being once separated dwells again, through affection with his father, brother or paternal uncle is termed re-united". The parties to the re-union should have been the parties to the original partition *(Ram Narain vs. Mst. Pan Kuer,* AIR 1935 PC 9). Further, there should be an express or implied agreement between the parties to re-unite with their estates/properties. *(Bhagwan Dayal vs. Mst. Reoti Devi,* 1962(1) SCJ 348). The agreement need not be in writing. The burden of proof lies on the person, who asserts re-union.

Case Comment (Part-C)

1. Problem: A, a father of a Hindu Joint Family mortgaged his sons' interest in the joint family property. Later, he (A) executed another (second) mortgage deed on the same property to clear (pay off) the earlier (first) mortgage. The creditor (Mortgagee) filed a suit on the second mortgage. His sons S1 and S2 challenged the validity of the mortgage by A. It was not proved that the amount (mortgage money) was used by A for immoral purposes - Decide.

Ans: Instant problem relates to (i) Antecedent debt; (ii) the Doctrine of pious obligation.

The relevant leading case on this point is:

Brij Narain vs. Mangal Prasad, 46 All 951 (PC).

Facts of the case: In the instant case, the father alienated a part of the joint family property, by executing a mortgage deed. Later, he executed a second mortgage deed on the same property for the interest accrued on the principal amount. In an action by the creditor (Mortgagee) of the second mortgage, it was held that the debt was antecedent to the second mortgage and binding on the sons.

Issues Involved: The issues or principles involved in the instant case are:

1. Whether the second mortgage of the joint family property by A constitutes 'Antecedent debt'?
2. Whether the Doctrine of Pious Obligation extends (is applicable) to the present case?

The above two questions can be answered in affirmative on the ground that:

i) the debt under the second mortgage is antecedent of the mortgage in fact as well as in time and hence, it is valid and binding.

ii) The Doctrine of the Pious Obligation extends to the sons S1 and S2, in the instant case as it was not established/proved that A has used the amount (mortgage money) for immoral purpose. In other words, the debt is not Avyavaharika and hence binding on the sons.

Write now in brief i.e. in two paragraphs about Antecedent debt and pious obligation.

Decision/Judgment: The Privy Council through Lord. Dunedin CJ, held that the debt under the second mortgage is antecedent of the mortgage in fact as well as in time and is binding.

Further, the doctrine of pious obligation exists not only after the death but also during the life time of the father and hence the debt is binding on the sons.

Conclusion: In view of the above, the second mortgage by the father, A is valid and is binding on his sons, S1 and S2.

2. Problem: (A.U July 2000, Part-C, Q.1, Marks: 20)

A Hindu father belongs to Mitakshara joint family wants to effect the partition of Ancestral property, during the process, the wife conceived. Can the child in the womb have any right to demand his share after his birth. (Clues: This problem refers to Reopening of partition. The Child in the womb has a right to reopen the partition after his birth).

QUESTIONS AND HOW TO ANSWER

Q) Aprathibanda and Saprathibanda Daya.(A.U. Model Q.P., Part-A, Q.3 and A.U. July, 2000, Part-A, Q.2, Marks : 4)

Ans. Direct Question. Write in brief i.e. in a paragraph/one page about 'Obstructed Heritage' and 'Unobstructed Heritage'.

Q) Doctrine of Pious Obligation. (A.U. Model Q.P., Part-A, Q.7, and A.U. July 2000, Part-A, Q.4, Marks: 4)

Ans. Write about the Doctrine of Pious Obligation in brief i.e. in a paragraph/one page.

Q) Karta of Joint Family. (N.U. April 1999, Part-A, Q.1, Marks:4)

Ans. Write in brief i.e. in one page covering his position and powers in brief.

Q) Critically examine the position, powers, privileges and obligations of Karta of a Hindu Joint Family. Can a woman be the Manager of Joint Family. (S.V.U. November 1999, Part-B, Q.10 and A.U. July, 2000, Part-B, Q.4, Marks: 18)

Ans. Write in detail about the topic 'Karta/Manager of a Hindu Joint Family including a female/woman can be a coparcener and Karta?

Q) Can a female be a coparcener. (A.U. July 2000, Part-A, Q.3, Marks: 4)

Ans. Write about it in a page from the topic 'Karta' of a Joint family.

Q) Write a critical note on reopening of partition. (A.U. July 2000 Part-A, Q.5, Marks: 4)

Ans. Write in one page about the meaning of partition and the reopening of partition.

Q) Explain the antecedent debt. (A.U. July 2000, Part-A, Q.6, Marks: 4)

Ans. Write about the antecedent debt in one page.

Q) "A coparcenary is purely a creation of Hindu Law" - Elucidate.

Ans. Write in detail, the first topic i.e. Coparcenary and Joint Family.

PART-V

THE HINDU SUCCESSION ACT, 1956

A person, so long as he is alive, is free to deal with his property in any way he likes. He is, by making a will, free to lay down his own scheme of distribution of his property after his death. This is known as a testamentary disposition. If he dies without leaving a will, it is the purpose of the law of inheritance to determine the persons who will take his property. In our contemporary world, someone must be the owner of the property, an individual, corporate person or state. The law of succession is classified as under:

i) Testamentary succession, and

ii) Intestate succession.

The law of testamentary succession is concerned how best the effect could be given to the wishes of the testator (i.e. the person who made the will), what are the rules relating to making of a will and allied and subsidiary matters. The testator enjoys full freedom of bequeathing his property.

The law of intestate succession is concerned with matters such as – who are the persons entitled to take the property, i.e. who are the heirs; what are the rules of preference among the various relations; in what manner the property is to be distributed in case a person has more than one heir, what are the disqualifications of heirs and the allied and subsidiary matters.

The law of intestate succession is more properly the law of inheritance. The law of inheritance consists of rules which determine the mode of devolution of the property of the deceased on heirs solely on the basis of their relationship to the deceased, while law of testamentary succession deals with the rules relating to devolution of property on relations as well as others. This is the main distinction between the two terms, succession and inheritance.

Succession opens at the time of the death of the person whose estate is in question and is governed by this law in force at this time.

Succession under Mitakshara and Dayabhaga Systems: There are two systems of inheritance amongst the Hindus in India, namely – the Mitakshara system and the Dayabhag system. The Mitakshara system prevails in whole of India except in Bengal and its adjoining parts, where the Dayabhag system prevails. The basic difference between the two schools arose on their different modes of interpretation of the term 'sapinda'. To mitakshara it meant the nearest in blood, the rules of consanguinity or proximity of blood relationship became the basis of determining the line of succession. Agnates are preferred to cognates.

Modes of devolution of property: The Mitakshara system recognizes two modes of devolution of property, namely –

a) Devolution by survivorship.

b) Devolution by succession.

The rules of survivorship applies with respect to joint family property or coparcenary property whereas the rules of succession apply with respect to property held in absolute severality by the last owner. The Dayabhag recognizes only one mode of devolution namely, succession. It does not recognize the rule of survivorship nor a distinction between joint family property and separate property. The reasons, according to Mulla, is that while every member of a Mitakshara joint family has only an undivided interest in the joint property, a member of a Dayabhag joint family holds his share in absolute owner thereof, and not to the surviving coparceners as under the Mitakshara law.

As stated above, when a person dies *intestate* i.e. without testate/ will, his/ her property is to be distributed among his/her legal heirs according to the law of Inheritance/law of Intestate Succession. This part of the subject (Part-II) deals with intestate succession of Hindus, which is governed by the Hindu Law of Inheritance (Old Law) and the Hindu Succession Act, 1956.

The Hindu Succession Act (hereinafter called the Act) came into force on June 17, 1956. It consists of 30 Sections divided into two parts — namely (1) Intestate Succession; and (2) Testamentary Succession. Sections 5 to 29 deal with 'intestate succession, while Section 30 deals with the testamentary succession. The main object of the Act is to streamline the rules of succession among the Hindus. It applies to the whole of India except the State of Jammu and Kashmir.

Object: The main object in passing the Hindu Succession Act, 1956 is to meet the needs of a progressive society. The old law did not fulfill the desired ends and remained hardly acceptable to a dynamic Hindu society of contemporary era. Hence there was a need for a uniform system of law of succession which may be acceptable to all sections of Hindus and be equally enforceable upon them. With this end in view the Hindu Succession Act, 1956 came into existence. It removes inequalities between men and women with respect to rights in property and it lays down a common list of heirs entitled to succeed on intestacy. The Act has been passed to amend and codify the entire law of succession.

Scheme of the Act: The Act has completely overhauled the law of succession as it existed before the commencement of the present Act. It now provides the following four schemes of devolution of property of a Hindu who dies intestate:

a) Devolution of coparcenary interest of Mitakshara coparcener, dying intestate leaving only male heirs mentioned in class I of the Schedule (Section 6).

b) Devolution of Coparcenary interest of a Mitakshara coparcener dying intestate leaving male and female heirs given in class I of the Schedule (Section 6).

c) Succession to separate or self acquired property of a male Hindu, dying intestate (Section 8-12).

d) Succession to the property of a female Hindu dying intestate (Section 15 & 16).

Sections 18 to 28 of the Act are captioned of 'general provisions relating to succession' and lay down the rules which are supplementary to the provisions contained in Sections 5 to 16.

The Hindu women's limited estate is abolished and replaced by absolute estate. Any property possessed by a female Hindu acquired lawfully either before or after the commencement of the Act becomes her absolute property and it is held by her as full owner not as limited owner. A separate scheme of succession of such property has been laid down in Sections 15 and 16 of the Act.

Main features of the Act: The Hindu Succession Act, 1956 came into force on 17th June 1956, the day which received the assent of the President (published in the Gazette of India, Extraordinary, part II, Sec.1, dated 18-06-1956). The following are some of the distinguishing features of the Hindu Succession Act, 1956.

i) The Hindu Succession Act, 1956 extends to the whole of India except the state of Jammu and Kashmir (Section 1).

ii) The Act applies to all Hindus (including a virashaiva, a lingayat or member of Brahma, Prarthana or Arya samaj), Buddhists, Jains and Sikhs but not to Muslims, Parsis and Jews. It has further been extended even to those persons, one of whose parents is a Hindu, Buddhist, Jain and Sikh (Section 2).

iii) The Act has overriding effect. It abrogates all the rules of the law of succession hitherto applicable to Hindus, whether by way of any text, customs or usage, having force of law. Any other law contained in the central or state legislation shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act (Section 4).

iv) The Act shall apply to all intestate Hindu successions except– a) to the property of a person to whose marriage provisions of the Special Marriage Act, 1954 apply, and b) to the impartible estates of Rulers, of Indian states,

succession to which is regulated by Special covenants or agreements or any existing enactments (Section 5).

v) The Act will also not apply to Mitakshara coparcenary property except when a coparcener dies leaving female heirs mentioned in Section 6. The Act has opened the right to succeed to certain females to the interest of a deceased in his coparcenary property (Section 6).

vi) Separate provisions for the devolution of interest in the property of a tarward, tavazhi, kutumba, kavaru or illom have been provided (Section 7).

vii) The Act lays down new provisions for the devolution of the property of a male Hindu dying intestate (Section 8).

viii) The Act provides the order of succession among heirs in the schedule (Section 9), rules relating the distribution of property among heirs in class I of the schedule (Section 10), and among heirs in Class II of the schedule (Section 11), rules of order of succession among agnates and cognates (Section 12), and the method of computation of degrees (Section 13).

ix) The Act has abolished Hindu women's limited estate and made her absolute owner of the property irrespective of its source of acquisition. Any property acquired by a Hindu female in any lawful manner whatever and possessed by her becomes her absolute property and she enjoys absolute power to dispose it in a way she desires (Section 14).

x) The Act has abolished Stridhan and provided the rules of succession relating to the different kinds of Stridhan (Section 15).

xi) The Act provided rules relating to order of succession and manner of distribution among heirs of a female Hindu (Section 16).

xii) The Act contained special provisions respecting persons governed by marumakkattayam and aliyasantanas laws (Section 17).

xiii) The Act lays down some general rules of succession inter alia to the effect that heirs related to a male or female intestate by full blood are to be preferred to those related by half blood if the nature of relationship is the same in every other respect (Section 18).

xiv) If two or more heirs succeed to the property of an intestate, they shall take their share per capita and not per stripes. Such heirs take the property as tenants in common and not as joint tenants (Section 19).

xv) The right of child in womb at the intestate's death and subsequently born alive shall relate back to the date of intestate's death (Section 20).

xvi) Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes, affecting succession to property it shall be presumed until the contrary is proved that the younger survived the older (Section 21).

xvii) Where property of an intestate devolves upon two or more heirs and any one of such heirs proposed to transfer his or her interest, the other heirs shall have a preferential right to acquire the interest proposed to be transferred (Section 22).

xviii) The right of residence to a female heir in the dwelling house of the intestate family is given if she is unmarried or is married but discarded or is a widow (Section 23) (this section has been deleted by the Hindu Succession (Amendment) Act, 2005).

xix) A murderer has been disqualified from inheritance on grounds of justice and equity (Section 25).

xx) A convert's descendants have been disqualified from inheriting the property of their Hindu relatives, unless such descendants are Hindus at the time when the succession opens (Section 26). The convert himself, in view of the

Caste Disabilities Removal Act, 1850, however, will not be so disqualified.

xxi) If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate (Section 27).

xxii) No person shall be disqualified from succeeding on the ground of any disease, defect or deformity or on any other ground not provided in the Act (Section 28).

xxiii) If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government, and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject (Section 29).

xxiv) A male Hindu is entitled to dispose of by will his interest in a Mitakshara coparcenary property (Section 30).

xxv) In the schedule to the Act, lists of heirs in Class I and Class II are given as explanation to Section 8 of the Act.

Major changes have been made in the Act through the Hindu Succession (Amendment) Act, 2005.

Over-riding effect of the Act (Section 4): This section gives overriding effect to the provisions of the Act. Thus all the existing laws, customs and usages which are inconsistent with this Act, are repealed. Since the Act has effected some fundamental changes in the law of succession, any text, rule or interpretation of law or customs or usages having force of law ceases to have effect with respect to all matters expressly dealt with by the Act.

The Act also supersedes the rule of succession contained in any Central or State enactment and any other law in force immediately before it came into operation by enacting that all other laws shall cease to apply to Hindus in so far as they are inconsistent with any provisions contained in the Act. For instance, the provisions of Section 7 will apply in case of the undivided interest of a Hindu in the

Aliyasantana, Kutumba or Kaveru and the rule of devolution given in Section 36(5) of the Madras Aliyasanta Act will be superseded in this respect (*Sundari v. Laxmi* (AIR 1980 SC 198).

The Act is a codifying enactment. It does not merely crystallize the existing law upon the subject but departs from the law already in force. It supersedes prior law and lays down the whole of the law of succession in the form of a Code. Therefore, appeal to any rule of law of succession previously applicable to Hindus is now permissible only in respect of matters, for which no provision is made in the Act. Matters affecting succession expressly saved from the operation of the Act, of course continue to be governed by the previous law statutory or otherwise.

The Act does not affect the law relating to joint family and partition. It also does not abrogate any rule of customary law in the Punjab relating to restriction on alienation by a male proprietor. The right of reversioners to challenge any such alienation, made before the commencement of this Act does not cease to exist *(Joginder Singh v. Kehar Singh* (AIR 1965 Punj. 407).

The provisions of this Act, however, will not apply to:

i) the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings;

ii) the provisions for the fixation of ceilings;

iii) the provisions for the devolution of tenancy rights in respect of agricultural holdings.

In *Anudhar & Others v. Chandrapati* (AIR 2003 SC 4389), the Court observed that, where the tenancy law is involved the succession would be governed by special mode of succession in tenancy law, not by the personal law i.e. Hindu Law.

Technical terms under the Act: Following are some of the important terms under the Act.

1. Intestate;
2. Ascendants;

3. Descendants;
4. Collaterals;
5. Heirs;
6. Agnates;
7. Cognates;
8. Full blood; or Full blood relations;
9. Half blood; or Half blood relations;
10. Uterine Blood; or Uterine blood relations; and
11. Legitimate and Illegitimate relationship; and
12. Reversioner.
13. Custom and Usage.
14. Related.

1. Intestate: When a person dies without making/leaving a will, he/she is called 'Intestate'. A will or testament is an instrument/ document, which declares/contains the intention of the owner of the property as to how his property is to be distributed after his/her death.

According to Sec.3(g) of the Hindu Succession Act, 1956, "a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect."

2. Ascendants: Ancestors of a person are called his/her 'ascendants.' Father and mother are the immediate ascendants. The father and mother of parents, their parents and so on. *Eg.*:— F, FF, FFF, M, MM, MMM, F.M., M.F., M.F.F., etc.

3. Descendants: The offspring of a person. The immediate descendants of a person are his/her sons and daughters. Similarly, their sons, daughters and so on. *Eg.* S, SS, SSS; D, DD, DDD; S, SD, SSD, SDS etc.

4. Collaterals: Descendants in parallel lines from a common ancestor/ancestors are called the 'Collaterals'. *Eg.* Brother, Sister, Paternal uncle and aunt, maternal uncle and aunt and their children.

5. Heir: Persons entitled to inherit property of the deceased are called "Heirs". According to Sec.3(f) of the Act, "Heir means any person, male or female, who is entitled to succeed to the property of intestate under the Act."

6. Agnates: (Important for Short Notes): It refers to relationship by male-link. When a person traces his relationship with another wholly through males, he or she is called an 'agnate'. In other words, a person is said to be an 'agnate', if he is related to the deceased (propositus) wholly through the male links, either by blood or by adoption. According to Sec.3(1) (a) of the Act, "one person is said to be an 'agnate' of another if the two are related by blood or adoption, wholly through males". *Eg.* Son's son's son; Brother's son's son; Father's brother's son's son.

Illustration: A died leaving behind, his son's son's son (SSS).

(A)

S

SS

SSS

In this illustration, SSS is an 'agnate' as he is related to A through the male links SS and S.

7. Cognates (Important for Short Notes): It refers to relationship by female link. The relations in whose chain of relationship to the propositus, there should be atleast one female link. In simple words, a person is said to be a 'cognate', if he/she is related to the deceased (propositus) wholly through the female links — either by blood or by adoption. *Eg.*— Daughter's son, Sister's son, Sister's daughter etc.

Illustration: A died leaving behind, his Daughter's daughter's daughter (DDD).

(A)

(D)

D D

DDD

DDD in this illustration is a cognate to A, as she is related to A through female links DD and D.

8. Full blood or Full blood relations: When the father and mother of the two (or more) persons are the same, such persons are said to be 'full blood relations'.

According to Sec.3(1) (e) (i) of the Act, "two persons are said to be related to each other by full blood, when they are descended from a common ancestor by the same wife".

Eg. Own or real Brothers, Sisters and Brother and Sister.

9. Half blood or Half blood relations: When two persons have the same father but different mothers, they are related to each other by half blood or they are called half blood relations.

According to Sec. 3(1)(e)(i) of the Act, "two persons are said to be related to each other by half blood, when they are descended from a common ancestor but by different wives". (Same father, but different mothers).

Illustration: A marries B and a son P, and daughter Q are born to him from B. B dies and A marries C and a son R is born to him from C. Later, A divorces C and marries D and a son S and daughter T are born to him through D. P,Q, R, S and T are related to each other as brothers and sisters by half blood.

In this clause i.e. Clause (e) ancestor includes father.

10. Uterine blood or Uterine blood relationship: Children born to the same mother but different fathers are said to be related to each other by uterine blood.

According to Sec.3(1) (e) (ii) of the Act, "two persons are said to be related to each other by uterine blood, when they are descended from a common ancestress but by different husbands".

In the above clause i.e. in Clause(e), ancestress includes 'the mother'.

Illustration: A, (a woman/mother) marries B and a son P and daughter Q are born to her from B. B dies and A marries C and

a son R is born to her from C. Later, A divorces C and marries D and a son S and daughter T are born to her through D. P, Q, R, S, T are related to each other as brothers and sisters by uterine blood.

11. Legitimate and Illegitimate relationship: A child born to a lawful wedded couple is called 'legitimate child'. The child (boy or girl) is related to his/her parents by legitimate relationship. Where as a child born outside the lawful wedlock is illegitimate and the child is related to his/her parents by illegitimate relationship.

According to Sec.3(1) (j) of the Act, 'related' means related by legitimate kinship. Provided that illegitimate children shall be deemed to be related to their mother and to one and another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

12. Reversioner: In Hindu law, a 'Reversioner' is the heir of the last male holder, who will take the property on the death of an intermediate female holder of a limited estate. For instance, A dies and his widow takes a limited estate. On the death of the widow, the property goes to the nearest heir of A and such heir is called the 'Reversioner'. With the passing of the Hindu Succession Act, 1956, the limited estate has been abolished and hence, the reversionership has ceased to exist.

13. Custom and Usage: The definition of the expression 'custom and usage' given in this clause, is similar to the definition of that expression given in the Hindu Marriage Act, 1955.

Custom: 'A custom is a rule which in a particular family or in a particular district, has, from long usage, obtained the force of law. It must be ancient, certain and reasonable, and being in derogation of the general rules must be construed strictly.'

14. Related: Related means related by legitimate kinship Section 3(1)(j). Kinship is created by blood or by adoption. Legitimacy depends upon lawful marriage. There is a proviso to this definition. Illegitimate children shall be deemed to be related to their mother and to one

another, and their legitimate descendants shall be deemed to be related to them and to one another and any word expressing relationship or denoting a relative shall be construed accordingly. Thus an illegitimate child shall, in no case, be recognized as an heir to his father. The mother will, however, be treated as a stock of descent and establishing relationship between her and her children. As regards descendants, only the legitimate only for one generation. Illegitimate children of subsequent generation lose their relationship to the ancestress. But they will be considered as property related to their mother brothers and sisters.

In the context of succession, the words importing masculine gender must not be taken to include females unless the context so requires.

This part of the subject covers mainly the following topics.

1. Hindu Male Intestate Succession (Sections 8-13);
2. Devolution of Coparcenary Interest (Section 6);
3. Women's property (Section 14);
4. Succession to the property of a Hindu Female (Ss. 15 & 16);
5. A.P. Amendment Act, 1986;
6. Disqualifications (Sections 24-28)
7. General Rules of Succession; and
8. Fundamental Changes Brought About by the Hindu Succession Act, 1956.

Lecture-VIII : Hindu Male Intestate Succession (Sections 8-13) (Succession to Hindu Male)

Sections 8 to 13 of the Hindu Succession Act deal with 'Hindu Male Intestate Succession'. According to Section 8 of the Act, when a male dies intestate (i.e. without testament/will), his property devolves as follows:

a) Firstly upon the heirs specified in Class I of the Schedule (Class I Heirs);

b) Secondly, if there are no Class-I heirs, the property devolves upon the heirs specified in Class-II of the Schedule (Class-II heirs);

c) Thirdly, in the absence of above two classes (i.e. Class-I and Class-II heirs), the property devolves upon the agnates, an agnate is a blood relation by birth or adoption through male relation, who do not come under Class-I or Class-II heirs.

d) Lastly, if there are no agnates, then the property devolves upon the cognates of the deceased. A cognate is a person related to the deceased wholly through the female link either by blood or by adoption.

In the absence of all the above, the property goes to the Government by escheat.

The words 'dying intestate' would apply where a male Hindu dies intestate not having made any will or having made an invalid will. The term 'property' in this section includes not only the separate or self acquired property but his interest in the coparcenary property after the partition thereof has been effected among all the coparceners. The section is prospective in its operation, that is to say that the section applies where on the death of a male intestate devolution of his property takes place after the commencement of the Act and does not govern succession to the property of a male Hindu whose death took place before the commencement of the Act.

It is to be noted that, Section 8 of the Act applies when:

i) there must be death of a male;

ii) the male must be a Hindu;

iii) he has left behind some property;

iv) he has not made any valid will in regard to his property, and

v) the male has died after the coming into operation of the Hindu Succession Act, 1956.

1. CLASS-I HEIRS

Class-I heirs are 12 in number as stated below:

1. Son.
2. Daughter.
3. Widow.
4. Mother.
5. Son of a pre-deceased son.
6. Daughter of a pre-deceased son.
7. Son of a pre-deceased daughter.
8. Daughter of a pre-deceased daughter.
9. Widow of a pre-deceased son, and
10. Son of a pre-deceased son of a pre-deceased son.
11. Daughter of a pre-deceased son of a pre-deceased son.
12. Widow of a pre-deceased son of a pre-deceased son.

By the Hindu Succession Amendment Act, 2005, in the list of heirs of Class I, the following heirs have been added:

i) Son of a pre-deceased daughter of a pre-deceased daughter.

ii) Daughter of a pre-deceased daughter of a pre-deceased daughter.

iii) Daughter of a pre-deceased son of a pre-deceased daughter.

iv) Daughter of a pre-deceased daughter of a pre-deceased son.

1. **Son:** The term 'son' has not been defined in the Act. It includes both a natural son and an adopted son. An adopted son is as good as a natural son, entitled to same share as a natural born son.

A posthumous son, i.e. a son of the intestate who was in the womb at the time of the death of the intestate and born alive subsequently, will be deemed for purposes of succession, to have born before the death of the intestate.

The illegitimate son of a male Hindu dying intestate is not entitled to any share by inheritance. But according to recent decision of the Supreme Court, now the position has been changed. Now illegitimate son of the male Hindu dying intestate is entitled for equal shares with legitimate son of male Hindu by inheritance.

In *Rameshwari Devi v. State of Bihar* (AIR 2000 SC 735), the Supreme Court held that, under Section 16 of Hindu Marriage Act, children of void marriage are legitimate under the Hindu Succession Act, 1956. A property of a male Hindu dying intestate devolves firstly on, heirs in class I which includes widow and son. The second wife taken by deceased government employee during subsistence cannot be described a widow of deceased employee, their marriage being void. The sons of the marriage between deceased employee and second wife being the legitimate sons of deceased would be entitled to the property of father in equal shares along with the first wife and the sons born from the first marriage. A step-son also is not entitled to succeed to the property of the step-father. The nature of the property inherited by the sons under Section 8 of the Act would be regarded as separate property and not ancestral in the context of their own sons i.e. grandsons of the deceased male Hindu (*Commissioner of IncomeTax v. Chander Sen*, AIR 1986 SC 1753).

2. **Daughter:** The daughter whether married or unmarried inherits simultaneously with a son, widow and the other heirs specified

in class I of the Schedule. Each daughter takes one share equal to that of a son. Unchastity of daughter is no ground for exclusion. The step-daughter would not be included within the meaning of the word 'daughter' as used in Section 8 of the Act for she is not related to the deceased by blood, nor is she his descendant.

The term 'daughter' would also include an adopted daughter. A posthumous daughter like a posthumous son will be deemed as if born before the death of an intestate. An illegitimate daughter of a male Hindu dying intestate is not entitled to any share of inheritance. However she is entitled to claim maintenance from her father.

3. Widow: Widow, who is lawfully wedded wife of the deceased Hindu male, inherits simultaneously with son, daughter and other heirs of class I of the Schedule. If there are more widows than one all the widows together will take one share, which they will divide amongst them equally. Unchastity of the widow is no longer a disqualification for her being excluded from succession. Nor remarriage will be a ground for divesting her of the estate which she has already inherited. Similarly conversion also is not a ground now for divesting her of the property inherited by her from her husband.

4. Mother: Mother of the deceased Hindu male dying intestate inherits simultaneously on par with son, daughter, widow and other heirs under class I of the Schedule. Unchastity or remarriage is not bar to inherit deceased son's property.

Mother includes adoptive mother.

A mother is entitled to succeed to the property of her illegitimate son as an heir in class I of the Schedule.

A step-mother is not entitled as mother to inherit to her step-son as one of the heirs in class I of the schedule.

5. Son of pre-deceased son: The son of a pre-deceased son inherits simultaneously with a son and other heirs specified in class I of the Schedule.

6. Daughter of a pre-deceased son: The daughter of a pre-deceased son inherits simultaneously with a son, daughter, widow, son of a pre-deceased son and other heirs specified in class I of the Schedule. Son's daughter would include the adopted daughter of a pre-deceased son.

7. Son of a pre-deceased daughter: The son of a pre-deceased daughter inherits simultaneously with a son, widow and other heirs specified in class I of the Schedule. Daughter's son will include the adopted son of the pre-deceased daughter.

8. Daughter of a pre-deceased daughter: The daughter of a pre-deceased daughter inherits simultaneously with son, daughter, widow and other heirs specified in class I of the Schedule. Daughter of a pre-deceased daughter includes an adopted daughter of pre-deceased daughter.

9. Son of a pre-deceased son of a pre-deceased son.

10. Daughter of a pre-deceased son of a pre-deceased son: The daughter of a predeceased son of a predeceased son inherits simultaneously with a son, daughter, widow and the other heirs specified in class I of the Schedule. It includes adopted daughter also of a pre-deceased son of a pre-deceased son.

11. Widow of a pre-deceased son.

12. Widow of a pre-deceased son of a pre-deceased son.

Shares of Class-I heirs : (Section 10): Section 10 of the Act deals with the distribution of property of the propositus among the Class-I heirs. The rules are:

Rule 1: The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2: The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3: The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4: The distribution of the share referred to in the rule 3:

i) Among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions, and the branch of his pre-deceased sons gets the same portions.

ii) Among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

Sons, daughters and the mother of the propositus will take once share each.

Illustration: P. dies leaving 2 daughters, 2 sons and mother. Then each gets 1/5 share.

M 1/5

(P)

S_1	S_2	S_3	S_4	Each gets
1/5	1/5	1/5	1/5	1/5 share.

Rule I: (Share of widow) According to Rule I, intestate's is widow is entitled to get one Share. If there are more than one widow, all of them together share that one share. E.g. X died leaving two sons and two widows. Then each son gets 1/3 and the two widows get 1/3 i.e. each widow gets 1/6 share.

(X) W_1 1/3

W_2

S1 S2

1/3 1/3

Rule 2: (Share of Son, Daughter and Mother): Rule 2 of Section 10 of the Hindu Succession Act, 1956 prescribes that the share of the surviving son, daughter and mother shall be equal. Sons and daughters may be more than one each; the mother shall always be not more than one. The property of the intestate will be divided in

as many shares as there are sons, daughters and mother and one widow alive. The widow or widows will get one share and the rest of the shares will be distributed, one each to the remaining heirs. If there is any heir of the first class of any predeceased son or daughter alive or capable of inheriting then a share will also be allotted to the branch of the deceased son or daughter.

For example if there is a son, daughter and mother and two widows alive and a daughter by a predeceased son and a son by a predeceased daughter also alive then the share will be distributed thus. The property will be divided in six equal shares, one-sixth share will go to the widow or widows under Rule I and a one-sixth share each will go to the son, daughter, mother, predeceased son's daughter and predeceased daughter's son.

Rule 3: (Share of Predeceased son or daughter's branch): Under Rule 3 of Section 10 of the Hindu Succession Act, 1956, the theory of representation has been applied and children of a predeceased child shall be deemed to represent the predeceased child for the purposes of succession.

For example, if there are a son, daughter and mother, two widows alive and a daughter by a predeceased daughter, a son and daughter and widow of predeceased son, and a son of predeceased son of predeceased son. The shares of each of the members will be as mentioned below:

1) Two widows will get a $1/12^{th}$ share each; i.e. together they get a share of $1/6^{th}$ which is equal to that of mother, son, daughter.

2) Mother also gets a $1/6^{th}$ share equal to that of the son or daughter.

3) Son and daughter who are alive get $1/6^{th}$ share each.

4) The daughter of pre-deceased daughter gets $1/6^{th}$ share representing her deceased mother.

5) Widow, son and daughter of the deceased son, son of predeceased son of predeceased son get each $1/24^{th}$ share each.

Rule 4: How and when question of Distribution of Shares of

one branch arises: Rule 4 of Section 10 of the Hindu Succession Act, 1956 merely explains Rule 3. Under Rule 3 the heirs in the branch of each predeceased son or each predeceased daughter of the intestate take between them one share.

Sub-rule (i) of Rule 4 merely reiterates Rules 1 and 2 as far as the deceased member is concerned. Sub-rule (i) provides that among the branch of the predeceased son the distribution of the shares shall be so made that his widow or if there are more than one widow they shall be treated as one unit for the purposes of succession and the surviving sons and daughters get equal portions and if the son has left a predeceased son, then the branch of that predeceased son gets the same portion.

Sub-rule (ii) of rule 4 provides that among the heirs in the branch of the predeceased daughter the distribution of the share shall be so made that the surviving sons and daughters of the predeceased daughter will get in equal portions.

In *Krishna Murali Mangal v. Prakash Narain and others* (AIR 2003 NOC (MP) 37), it was observed that a Hindu deceased father having 5 sons and three daughters, and among them two sons were separated earlier and had received their respective shares and father and other three sons remaining joint, each of the three sons remaining in joint family would be entitled to 1/4th share in the joint family property. 1/4th share of their deceased father would be divided equally among five sons and three daughters. Hence each of them would get 1/32 and share in the joint family property. Thus three sons remained joint with their father would get 1/4th 1/32nd share i.e. 9/32nd share each in the joint family property. The two sons who separated earlier and three daughters would be entitled to only their father's share i.e. each would be entitled to 1/32nd share.

2. DOCTRINE OF REPRESENTATION (Short Notes)

Where a Hindu dies intestate, the nearest heir succeeds the property excluding the distant heir i.e. the remoter. However, there are certain circumstances in which the distant heir or remoter succeeds the property by representing the predeceased parent, who was the

nearer heir and could have been preferred if he were alive. According to this doctrine, the representatives will step into the shoes of their deceased parent.

The doctrine has a limited application in Hindu Law as laid down in:

Marudayi vs. Doraisami 30 Mad. 348 — In this case, A died leaving behind his son B and two grand-sons D1 and D2 i.e. the sons of his predeceased son, C.

[A]

B (C) D1 D2

Since C died, B claimed the whole property as the nearer heir on the principle that the nearer (i.e.B) excludes the remoter (i.e.D1 and D2). The Court, applying the principle of representation, held that D1 and D2 are entitled to one share i.e. the share of their predeceased parent C. Under the Hindu Law, prior to 1956, the son of a predeceased son (SS) and the son of a predeceased son of a predeceased son (SSS) succeed the intestate on the principle of representation and no one else could claim the benefit under the principle of representation.

Application of the doctrine under the Modern Hindu Law: Sec.10(c) of the Hindu Succession Act, 1956 speaks about the principle of representation. The Act extends the principle to the daughter of a predeceased son, daughter of a predeceased son of a predeceased son, son of a predeceased daughter and daughter of a predeceased daughter.

Sec.10(c), which deals with the doctrine, reads as follows:

C(i) : Among the heirs of the branches of predeceased son, son of predeceased son of a predeceased son and predeceased daughter, the doctrine of representation applies. In other words, heirs in each branch would take the same share, which their parent (son, grandson or daughter) would have taken had he/she been alive, when succession opened.

(ii) The heirs of each branch take per capita (i.e. per head) but if there are more widows than one in the branch of the predeceased son, or a pedeceased grandson, all the widows together in each branch will take one share.

The above stated principles are the simplified version of Rules 3 and 4 as laid down in Section 10.

Class-II Heirs: According to Section 8(b) heirs in Class II will succeed only in total absence of any heirs in class I. Heirs in Class II are divided into nine groups; each group is mentioned in a separate entry in the Schedule. According to Section 9 the heirs of first entry are preferred to heirs of second entry, and the heirs in the second entry are preferred to the heirs of third entry and so on in succession. Section 11 which lays down the mode of distribution of property among the heirs of Class II of the Schedule runs as follows:

'The property of an intestate shall be divided between the heirs specified in any one of the Entries in Class II of the Schedule and they share equally.'

Thus where, there is only one heir in the Entry preferred, he or she alone shall take the whole of the estate. But when there are more heirs than one in the entry preferred, then all such heirs shall take equally and the heirs related to the intestate by full blood shall be preferred to heirs related by half blood. In simple words, in the absence of Class-I heirs, the property devolves upon Class-II heirs as stated below under 9 categories:

Category-I : Father

Category-II : A. Son's Daughter's Son

B. Son's Daughter's Daughter

C. Brother

D. Sister

Category-III : A. Daughter's Son's Son.

B. Daughter's Son's Daughter

C. Daughter's Daughter's Son

D. Daughter's Daughter's Daughter.

Category-IV : A. Brother's Son

B. Sister's Son

C. Brother's Daughter

D. Sister's Daughter.

Category-V : A. Father's Father

B. Father's Mother

Category VI : A. Father's Widow

B. Brother's Widow.

Category-VII: A. Father's Brother

B. Father's Sister

Category-VIII: A. Mother's Father

B. Mother's Mother

Category-IX : A. Mother's Brother

B. Mother's Sister

Explanation: In this Schedule references to a brother or sister do not include references to a brother or sister by uterine blood.

In *K.Raj and others v. Muthamma* (AIR 2001 SC 1720), where a real brother died intestate leaving behind his sister, the court held that under Hindu Succession Act of 1956, the uterine sister could not inherit the property of her brother because in Class II of the Schedule a note appended to the provision clarifies that sister does not include uterine sister that is to say, according to the said provision uterine sister will not be an heir of such brother's property.

In the absence of all the heirs under Class-I, the chance comes to category I of the Class-II heirs i.e. Father, who gets the property completely. In his (Father's) absence, the chance comes to Category-II under Class-II. In this category, there are four, who get

simultaneously. Likewise in the absence of the preceding Category, the succeeding category will get the property. When the chance comes to a particular category, all the heirs in that category will get the property simultaneously.

Likewise, in the absence of Class-I and Class-II heirs, the property devolves upon the Agnates.

Agnates: A person is said to be an 'agnate' when he is related to the deceased wholly through the male link/relation by blood or by adoption. Eg. Son's son's son; Brother's son's son; Father's brother's son's son etc.

As stated above, some of the agnates viz. son's wife, son's son, son's daughter etc. appear under Class-I heirs. Similarly, there are some other agnates viz. Brother's son; Brother's daughter etc. appear under Class-II heirs. Those agnates, who come under Class-I or Class-II heirs do not come under the category of agnates under Section 8 of the Act.

Cognates: In the absence of the Class-I heirs, Class-II heirs and Agnates, the property devolves upon the Cognates. A person is said to be a Cognate if he/she is related to the deceased wholly through the female link either by blood or by adoption. Eg:- Daughter's son; Sister's son; Sister's daughter etc. There are certain Cognates, who come within Class-I heirs. Eg:- Daughter's son; and Class-II heirs. Eg:- Son's daughter's son. Such Cognates do not come under this class (Rule 4 of Section 8).

Compact Series of Heirs (Imp. for Short Notes): Before 1956, if a Hindu died leaving no son, the property was to be devolved according to the Test of Yagnavalkya. According to the test, the word 'putra' includes son, son's son and son's son's son. In the absence of putra, the order of succession is in accordance with the following series known as *'Compact Series of Heirs'*.

Wife

Daughter

Daughter's son

Mother

Father

Brother

Brother's son

Brother's son's son

As stated in the above table, in the absence of 'putra', the property devolved upon wife. In the absence of wife, the property went to the daughter and so on as shown above.

However, after 1956, the above eight members are included in three classes. The first four in Class-I heirs, next three in Class-II heirs and the last one under the Agnates.

Lecture-IX :Succession to Mitakshara Coparcener's Interest

This Lecture deals with:

1. Devolution of Interest in Coparcenary Property before the Hindu Succession (Amendment) Act, 2005, and
2. Devolution of Interest in Coparcenary Property under Section 6 of the Hindu Succession (Amendment) Act, 2005.

1. DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY UNDER SECTION 6 OF THE HINDU SUCCESSION (Amendment) Act, 2005

Section 6 of the Hindu Succession Act, 1956 provides for certain special provisions relating to devolution of interest in a Mitakshara Coparcenary Property. After the commencement of the Act, when a Male Hindu dies intestate, leaving interest in the coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary, and not in accordance with this Act. In other words, under the Mitakshara Law, the undivided share of a coparcener in the joint family property devolves by survivorship upon the surviving coparceners on his death and not on his heirs.

Illustration: A Mitakshara Coparcenary consists of F, the father, and his two sons S1 and S2. F dies leaving his undivided interest in the coparcenary property and leaving behind his two sons S1 and S2 and a daughter D. F's interest devolves upon S1 and S2, the surviving coparceners by the rule of survivorship. The daughter is not entitled to get any share as she is not a coparcener. (Under Mitakshara Law, no female is a coparcener).

1. Position under the Hindu Succession Act, 1956: Under Section 6 of the Hindu Succession Act, 1956 the interest of a Mitakshara coparcener devolves either by survivorship or Succession depending upon the circumstances in the coparcenary.

A. Devolution of Mitakshara coparcener's interest by survivorship: Under Section 6 of the Act, the undivided interest of a Mitakshara coparcener devolves by survivorship upon the surviving coparceners if the coparcener dies leaving behind no Class-I female heirs or Class-I male heir claiming through Class-I female heir.

Illustration-1: A coparcenary consists of F, the father and his two sons S1 and S2. F dies leaving behind his sons S1 and S2 and no Class-I female heirs. F's interest in the coparcenary property devolves upon his sons S1 and S2 who are the surviving coparceners.

Illustration-2 :A coparcenary consists of three brothers A, B and C. A dies leaving behind his brothers B and C and his mother's mother who is a Class-II heir. A's interest devolves upon his brothers B and C who are his surviving coparceners and not upon mother's mother. Mother's mother is not a coparcener.

B) Devolution by Succession: Proviso to Section 6 lays down that if a Mitakshara coparcener dies leaving behind a Class-I female heir or a Class-I male heir claiming through a Class-I female heir, his interest will not devolve by survivorship, but by succession as provided under the Hindu Succession Act, 1956. The Class-I female heirs are: Mother, Widow Daughter, Son's Daughter, Son's Sons's Widow. There is one Class-I male heir, who claims through Class-I female heir. He is Daughter's son. If a coparcener dies leaving any one of the above relations, his interest in the coparcenary property devolves by succession under the provisions of the Hindu Succession Act and not by survivorship.

Illustration: A coparcenary consists of F, the father, his son, S and a daughter, D. F dies leaving his undivided interest in the coparcenary property and leaving behind his son S, and daughter D. As F dies leaving behind a Class-I female heir, daughter D, the interest devolves by succession upon his legal heirs under the Hindu Succession Act.

Notional Partition: To ascertain the share of the deceased coparcener in the coparcenary property, Explanation I to Sec. 6 provides for notional partition. Explanation-I says that, the interest of a Mitakshara Coparcener shall be deemed to be the share in the property that has/have been allotted to him if a partition of the property had taken place immediately before his death. Under notional partition, share should be allotted to all those persons, who are entitled to share the property in case of actual partition. Once the share of the deceased coparcener is ascertained, we have to ignore the shares allotted to others under notional partition, as it is not a real partition. Notional partition has to be used to demarcate the interest of the deceased coparcener, and once that is done, the rest should be forgotten. Once the share of the deceased coparcener is ascertained, then, it should be distributed among his Class-I heirs as per the provisions of the Act.

Illustration-1: A joint family consists of F, the father and his son, S and a daughter D. F dies leaving his undivided share and leaving behind his son S and daughter D. As F dies leaving behind a Class-I female heir, daughter D, his interest devolves by succession under the Act. To ascertain the share of F in the coparcenary property, a notional partition should be made. Under notional partition F and S are allotted one share each. No share is allotted to the daughter under notional partition as she is not a coparcener. Daughter has no right to share the joint family property in a partition. Under notional partition, share of F is 1/2. This 1/2 goes to his son S and daughter D equally by succession since they are the Class-I heirs. Ultimately, son takes 1/2 share under notional partition + 1/4th from his father's share. The daughter takes only 1/4.

Illustration-2: A joint family consists of F and his two sons S1 and S2. F dies leaving his undivided interest and leaving behind his widow and two sons S1 and S2. If F dies leaving behind a Class-I female heir, his widow, his interest devolves by succession. F's share under notional partition is 1/3. It goes to his sons and daughter equally by the succession. They take 1/9 each.

C) Rights (shares) of female in Notional Partition: Under the Mitakshara Law, as applicable to North India, certain females like Father's wife (widow). Mother and Paternal grand mother are entitled to share the joint family property in case of actual partition. However, these females have no right to demand partition. Now the question is, what are the rights of these females under notional partition under Section 6? In other words, the widow (father's wife) is entitled to claim the share allotted to her under notional partition, in addition to her share in the interest of her husband, which she gets by succession as Class-I heir. Our High Courts are divided on this point. The High Courts of A.P. (in *Neelayya vs. Ramaswami*), Kerala *(Venkateswara vs. Luis),* and Allahabad *(C.E.D. vs. Nnari Devi)* took the view that the widow is only entitled to get her husband's share and she is not entitled to get the share allotted to her under notional partition. However, the High Courts of Bombay *(Rangubai vs. Laxman; Sushilabai vs. Narayan Rao*), Orissa *(Ananda vs. Haribandhu)* and Gujarat *(Vidyaben vs. Jagadish)* held that the widow is entitled to get not only a share from her husband's share but also the share allotted to her under notional partition. The second view was approved by the Supreme Court in *Gurupad vs. Hirabai* (AIR 1978 SC 1239).

The facts of Gurupad case are:

(P) W (Hirabai)

S1 (Gurupad) S2 D1 D2 D3

A coparcener died leaving his widow (Hirabai) and two sons and 3 daughters. The Supreme Court held that under Section 6 a notional partition between A and his two sons as A's wife Hirabai is entitled for allotment of a share. So she would get at notional partition 1/4. The share of her deceased husband is 1/4. His 1/4 share should be divided among his widow (Hirabai), 2 Sons and 3 Daughters equally. So Hirabai gets 1/4 x1/6 = 1/24 from her husband's share. Her total share would be 1/4 under notional partition + 1/24 from her husband's share = 7/24.

2. DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY UNDER SECTION 6 OF THE HINDU SUCCESSION (Amendment) Act, 2005.

The Hindu Succession (Amendment) Act, 2005 which was passed on 29th August 2005 and later assented by President of India, on September 5, 2005, has widely affected the concept of Mitakshara Hindu Coparcenary. The Hindu Succession Amendment Act 2005 has totally damaged the concept of Mitakshara coparcenary because the daughter has been treated like a son under the Hindu Succession Amendment Act of 2005. She becomes entitled to a share in coparcenary by birth. She by birth becomes a coparcener in her own right in the same manner as the son, she is not only conferred the coparcenary right as the son; she has been given all the rights possessed by son in the coparcenary and similarly she is also bound by the liabilities as a son. The major achievement lies in including all daughters especially married daughters, as coparcener in joint family property.

The 2005 Act does not touch separate property (except broadening the Class I heirs). But it includes daughters as coparceners in the Mitakshara joint family property, with the same rights as sons to shares, to claim partition and (by presumption) to become Karta (Manager), while also sharing the liabilities.

In addition, the Act makes the heirs of predeceased sons and daughters more equal, by including as Class I heirs two generations of children of predeceased daughters, as was already the case for sons. The main significant change making all daughters (including married ones) coparceners in joint family property is also of great importance for women, both economically and symbolically. Economically it can enhance women's security by giving them birth rights in property that cannot be willed away by man. In a male-biased society where wills often disinherit women, this is a substantial gain. Also, as noted, women can become Kartas of the property. Symbolically, all this signals that daughters and sons are equally important members of the parental family. It undermines the notion

that after marriage the daughter belongs only to her husband's family. If her marriage breaks down, she can return to her birth home by right, and not on the sufferance of relatives. This will enhance her self-confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families.

Giving married daughters coparcenary rights by the state is unusual. Except Kerala, which abolished joint family property and together, in other state-level amendments of Hindu Succession Act, viz. Tamilnadu, Andhra Pradesh, Karnataka and Maharashtra – only daughters unmarried when the amendments were passed got coparcenary rights. Notably, however, they retained this right on subsequent marriage, and fear of extensive litigation by such married daughters have proved false.

Under the 2005 Amendment Act, married daughters will also benefit by the deletion of Section 23 of Hindu Succession Act, 1956, since now they will have residence and partition rights in the parental dwelling house. In particular, women facing spousal violence will have somewhere to go. The only negative aspect is that allowing partition could increase the vulnerability of elderly parents. A preferred alternative would have been to bar both sons and daughters from seeking partition during their parents life-times, if the family had only one dwelling.

In *Nagammal v. N.Desiyappan* (AIR 2006 Mad. 265), the Madras High Court held that unmarried daughters of Hindu coparcener shall become coparcener by birth and unmarried daughters of deceased are to be treated equally with son and are entitled to equal share.

Recently in *Nilamdhaba Das vs. Janaka Kumari Devi* (AIR 2009, UTR-NOC 862), the Court upheld that, after passing of the Hindu Succession Amendment Act, 2005, any partition after 20th December, 2004, devolution of interest in coparcenary property the daughter is entitled to half share in the suit property because the daughter is coparcener in the family by birth, she is entitled to allotment of the share in a coparcenary property equal with the son.

Remaining anomalies: Some anomalies also persist. One stems from retaining the Mitakshara joint property system. Making daughters coparceners will decrease the shares of other Class I female heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline. In States where the wife takes a share on partition, as in Maharashtra, the widows potential share on partition, as in Tamilnadu or Andhra Pradesh, the widows potential share will fall below the daughters. Abolishing the Mitakshara system altogether would have been more egalitarian, as some of us had suggested. But such abolition needed to be devolved with partially restricting the right to will (say to 1/ 3rd of the property). Such restrictions are common in several European Countries. Otherwise women may inherit little, as will often disinherit them. However, since the 2005 Act does not touch testamentary freedom, retaining the Mitakshara system and making daughters coparceners, while not the ideal solution, at least provides women assured shares in joint family property (if we include land holdings, the numbers benefiting could be large).

Effects: The effects/results of the Amendment Act, 2005 are detailed below:

i) Making daughters coparceners will decrease the shares of other class I female heirs such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline.

ii) In states where the wife takes a share on partition, as in Maharashtra, the widows potential share will now equals the son's and daughter's. But where the wife takes no share on partition as in Tamil Nadu or Andhra Pradesh, the widows potential share will fall below the daughters.

Bima Agarwal (in his article 'Landmark step to gender equality' – September 25, 2005, weekly edition 2) states that since the 2005 Act does not touch testamentary freedom, retaining the Mitakshara system and making daughters coparceners while not the ideal solution, at least provides women assured shares in joint family property (if we include land holdings the numbers benefiting could be large).

To illustrate the practical results the shares of similar case of *Gurupal v. Hirabai* (see as explained above), change as after the Amendment Act, 2005 given below:

i) The share of each daughter rose to ($1/7^{th}$ + $1/42^{th}$) from $1/24^{th}$, and

ii) The share of each son and widow decreased to ($1/7^{th}$ + $1/42^{th}$) from ($1/4^{th}$ + 1/24 = 7/24). All the members of coparceners get equal share (i.e. 1/7 + 1/42 = $1/6^{th}$).

Lecture-X : Woman's Property (Stridhan and Woman's Estate)

Before the passing of the Hindu Succession Act, 1956, the property of a woman was categorised under two heads namely:

1. Stridhan; and

2. Woman's Estate

1. STRIDHAN

Property held by women in their exclusive right has been called the 'Stridhan' and has been recognized in early Hindu Law. The word 'Stridhan' literally means "Woman's Property". According to Manu 'Stridhan is':

i) What was given before the nuptial fire (Adhyagni).

ii) What was given at the bridal procession (Adhyava hanika).

iii) What was given in token of love (Dattam Pritikarmini), and

iv) What was received from a brother,

v) What was received from a mother, or

vi) A father,

are considered as the six forms of property of a woman.

The definition of Manu is supposed to be the principal definition of Stridhan.

According to Yajnavalkya, stridhan is what was given to a woman by a father, mother, husband or her brother or received by her at the nuptial fire or presented on her succession (Adhivedanika) and the like (adya) is denominated stridhana to that which is given by kindred, as well as her marriage fee (sulka) and anything bestowed after marriage.'

According to Dayabhaga school, all gifts from relations constitute stridhan except a gift of immovable property made by husband; and the gifts from strangers who constitute stridhan if made before the nuptial fire or at the bridal procession.

The following properties are not stridhan according to Dayabhaga school:

i) Property inherited by a woman.

ii) Property obtained by her on partition.

iii) Gifts from a stranger made after the nuptial fire or bridal procession.

iv) Property acquired by the mechanical arts.

The Dayabhaga School of Hindu Law has used the word stridhan in a restricted and technical sense, whereas the Mitakshara school has given it a broader meaning.

Thus according to the texts, expression 'stridhan was not used in its etymological sense of 'female property' and its only gifts obtained by a woman from her relations and her ornaments and apparel which constitute her stridhana and the only sort of gifts from strangers which come under that denomination are presents before the nuptial fire and those made at the bridal procession. But neither gifts obtained from strangers at any other time nor her acquisitions by labour shall constitute her stridhana.

As in Mitakshara, property inherited by a woman from another woman is not stridhan, so also in Dayabhaga the property inherited by a woman from another woman is not her stridhan.

In Hindu Law, the word 'stridhan' has been given a technical meaning. In general, the following types of properties come within the purview of stridhan:

i) Gifts received from relatives.

ii) Gifts and bequests received from strangers during maidenhood.

iii) Property obtained in partition.

iv) Property got in lieu of maintenance.

v) Property acquired by inheritance.

vi) Property acquired through technical skill and art.

vii) Property acquired by compromise.

viii) Property acquired by adverse possession.

ix) Property purchased with the earnings of the Stridhan or with savings of income from Stridhan.

x) Property acquired lawfully from sources other than those mentioned above.

Characteristic Features of Stridhan: 1. Stridhan has all the characteristic features of the absolute ownership. It means that she has a right to use, gift, mortgage, lease, exchange or if she chooses, she can destroy.

2. On her death, all types of Stridhan passed to her heirs (and not to the heirs of last male owner).

Succession to Stridhan: Regarding the devolution of Stridhan, in ancient times, different schools adopted different rules. According to Vignaneswara, the woman's property goes to her daughter. In case of a maiden, her property goes to the male i.e. her uterine brother. In the absence of the uterine brother, it goes to her mother. In the absence of the mother, it goes to her father.

The Hindu Succession Act, 1956 has abrogated the law relating to Stridhan which existed prior to the incorporation of Section 14 in the Act. Section 14 provided that every property which was in possession of a Hindu female at the time of the enforcement of the Act, whether acquired prior to or subsequent to the Act, became her absolute property. The old law relating to the order of succession to such property has been done away with and a new order of succession has been introduced in its place, which included females as well. A uniform law relating to various categories of heirs has been contained in Section 15 of the Act. Since every property validly in her possession became her stridhan, a full uniform law of succession to such property had become essential. Thus on the death of a Hindu female intestate, her stridhan devolved according to the rules contained

in Sections 15 and 16, but in no case according to the old law.

Section 15 lays down that when a Hindu female dies intestate leaving her stridhan, it would devolve upon the following categories of heirs according to the rules provided in Section 16 of the Act:

Firstly, upon sons and daughters (including the children of a predeceased son or daughter) and husband;

Secondly, upon the heirs of husband;

Thirdly, upon father and mother;

Fourthly, upon the heirs of father;

Fifthly, upon the heirs of mother.

Difference between widow estate and life estate: Both the life estate and limited estate come to an end on the death of the estate holder. In spite of their resemblance they differ from each other in the following aspects.

i) Life-estate arises by grant and limited estate arises by inheritance.

ii) The remainder (the person inherits the property after the death of the like estate holders) has a vested interest. In the limited estate the reversioner has no vested interest till the death of spes successionis, i.e. a mere change of getting the property.

iii) There are differences with regard to the alienatory power of the life estate and limited estate.

2. WOMAN'S ESTATE

When a female inherited property from a male or female, was treated as her non-stridhana property over which she had no power of disposition by sale, mortgage, lease, gift or will, such property held by the female was popularly known as 'woman' estate or 'limited estate' wherein she had no interest in the estate beyond her life, then on her death the property passes not to her heirs, but the next heir of the last full owner, who was called 'Reversioner'. This is the view

of all the schools of Hindu law except the Bombay School of Mitakshara and Mayukha. According to Bombay school, property inherited by a female from a female and property inherited from a male by female heirs other than those come into the gotra of the deceased owner by marriage, is stridhan. Female who come into the gotra of the deceased owner by marriage take a limited estate in the property inherited by them from a male and on their death the property passes to the next heir of the last fully owner – called 'Reversioner'.

The following two categories of property come within the purview/meaning of woman's estate:

1. Property obtained by inheritance; and
2. Share obtained on partition.

Characteristic Features of Woman's Estate: The female takes it as a limited owner and hence it is also known as 'Limited Estate'.

The Hindu Woman's Right to Property Act, 1937 conferred on Hindu Woman, life estate or limited estate on her husband's property. She was the absolute owner of such property subject to the following two limitations:

1. She could not ordinarily alienate.
2. The property devolved upon the next heir of the last full owner (i.e. reversioner).

Powers: The Hindu woman, i.e. the holder of the woman's estate has the following powers:

A) Power of Management; and

B) Power of Alienation.

A) Power of Management: The Hindu Woman's power of Management is absolute. Her position in this respect is somewhat superior to that of the Karta of Joint Family. The Karta is answerable to the other coparceners. But, she alone is the sole owner and is not answerable and accountable to anyone. She is entitled to entire

income and has the power to spend and save the same. She continues to be the owner until the forfeiture of estate by her remarriage, adoption, death or surrender.

B) Power of Alienation: She can alienate the property for the following purposes:

a) Legal Necessities,

b) For benefit of the Estate, and

c) Religious Purposes.

a) Legal Necessities: Whenever there arise legal necessities, the women, possessing limited estate can alienate the property for the following purposes which have been held to be legal necessity:

i) Cost of taking probate of letters of administration or succession certificate in respect of the estate of the deceased owner.

ii) Payments of arrears of Government revenue and the decrees for rent accrued due after the death of the deceased owner provided she had no funds to pay them.

iii) Maintenance of herself and the other persons like deceased's mother, grandmother and unmarried daughters.

iv) Marriage of the religions of the deceased owners, such as his daughter, son's daughter etc.

Effects of alienation made without legal necessity and without the consent of reversioners:

Any disposition of the property by a limited owner (widow) shall not be binding upon the next reversioner if the disposition is without the consent of reversioners or without any legal necessity. However such disposition shall not altogether be void, rather it shall be voidable at the option of the reversioners. This option can be exercised by them either before they acquire possession or afterwards. When the reversioners consent to the alienation in totality or partially, then in absence of evidence to the contrary, such alienation shall be deemed to have been made in legal necessity and will be binding on all. In

Rangaswami case the Privy Council has held that when the alienation is supported by partial or total necessity, in that case if necessity is not proved in itself and it is not shown that the alienee purchased it with bona fide knowledge of such necessity, the alienation would not be binding upon the reversioners.

The Supreme Court too has held in *Sebbu Chettes Family v. Raghava Mudaliyar* (AIR 1961 SC 797), that if a presumptive reversioner is a party to an arrangement called a family arrangement and takes benefit under it, he would be precluded from disputing the validity of the said arrangement when reversion falls open and he becomes the actual reversioner. The doctrine of ratification may also be invoked against a presumptive reversioner who, though not a party to the transaction, subsequently ratifies with full knowledge of his rights by assenting to it and taking benefit under it. The mere receipt of benefit under an arrangement by which a Hindu widow alienates the property of deceased husband would not however, preclude a presumptive reversioner from disputing the validity of the said alienation.

Following observations also have been made by the Supreme Court in *Radha Rani v. Hanuman Pd.*(AIR 1966 SC 216)l, in this context – 'In the case of an alienation by a Hindu widow without legal necessity, the reversioners are not bound to institute a declaration suit during the lifetime of widow. They can sue after her death (the alienee) for possession of the alienated property treating the alienation as nullity without the court's intervention ..... In the case of the death of the widow during the pendency of the declaratory suit, her heirs are not necessary parties to the suit.'

Since the reversions are not entitled to the possession at the time of the suit, the next reversioners are entitled to sue for a bare declaration and thus Section 42 of the Specific Relief Act shall not be applicable. Hence the views expressed in *Hanuman Pd. V. Indrawate* (AIR 1958 All. 304) case are no longer a good law.

Reversioners

Who are reversioners? Any surviving male or female who would have been heir of the last absolute owner had he been alive

at that time was called a reversioner, who was entitled to succeed the property after the death of the limited owner (widow).

Presumptive and remote reversioners: Those reversioners who were entitled to succeed immediately after the (widow) limited owner died were the next or presumptive reversioners and those who were to succeed other than were referred to as remote or contingent reversioners. No privy of estate was required to be present between these two types of reversioners.

Nature of the reversioner's interest: So long as the limited owner is alive, none of the reversioners has any vested interest in the estate. It cannot be said that any of the reversioners have personal or individual tangible right over any specified part of the property. Reversioner's interest is expectant on the death of the limited owner. In this way it is *spes successionis* within the meaning of Section 6 of Transfer of Property Act.

Rights of reversioners: Reversioners had the following rights during the lifetime of limited owner:

i) A suit could be brought by them to restrain the limited owner from making an improper disposition.

ii) A declaration could be given by them that any alienation made by the limited owner was not valid after the lifetime of the limited owner.

iii) If any grant by will was prejudicial to the interest of the reversioners, then he could oppose the grant of probate.

iv) Where a widow claimed to be absolute owner of the woman's estate, reversioners could declare or file a suit for declaration that she was only a limited owner of the estate.

v) A suit could also be filed by them against the trespassers of the woman's estate or a suit could also be filed against the persons claiming adverse possession for the declaration to the effect that such possession was not binding upon them.

However a reversioner could not institute a suit for a declaration that he was the next reversioner during the lifetime of the widow.

b) Benefit of Estate: For the improvement of the estate, and as a sequence of improving the same, the woman can alienate some of the property of limited estate.

To uphold an alienation by a widow or other limited heir of the corpus of immovable property inherited by her it should be shown:

i) That there was legal necessity, or

ii) That the alienee, after reasonable inquiry as to the necessity acted honestly in the belief that the necessity existed, or

iii) That there was such consent of the next reversioners to the alienation as would raise a presumption that the transaction was a proper one, or

iv) If it was a surrender by her of her whole interest in the whole estate in favour of the nearest reversioner at time of alienation.

c) Religious Purposes: For the religious purposes, the Hindu widow was entitled to cause expenditure from the estate of her limited estate for the following:

i) Performance of the sraddha ceremony of the deceased.

ii) Performance of the sraddha ceremony of the husband's mother.

iii) Other religious acts which are conducive to the spiritual welfare of her husband.

iv) Payments of debts of the deceased owner even though barred by limitation.

In any case, an alienation made by her is binding on her during her lifetime. She could also renounce the estate in favour of the nearest reversioners.

Abolition of Woman's Estate: Section 14 of the Hindu Succession Act, 1956 has abolished the woman's estate. However,

reversioners are still relevant in the woman's estate alienated by her before June 17, 1956 i.e before the commencement of the Hindu Succession Act, 1956.

Section 14 of the Hindu Succession Act removed the distinction between Stridhan and Woman's Estate and converts existing woman's estate into her absolute property or Stridhana. It reads as follows:

"S.14: Property of a female Hindu to be her absolute property:

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation: In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section(1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award, where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property".

For Sec.14 to come into play, the following conditions are to be satisfied.

i) She must be in possession of the property, when the Act came into force. The property, is regarded as Stridhana under Sec.14 upon the fulfilment of the following conditions:

a) The possession must be lawful: The possession to be valid, it must be lawful. In *Erramma vs. Veerupana,* AIR 1966 SC 1879, it was held that the possession obtained by the step-mother of the deceased was not lawful and hence Sec.14 could not come into play.

b) The possession need not be actual, but may be constructive: It means actual physical possession is not necessary *(Munnalal vs. Rajkumar,* AIR 1962 SC 1493).

Object of Section 14: The object of Section 14 of the Act is two-fold: first to remove the disability of a female to acquire and hold property as an absolute owner; secondly, to convert any estate already held by a woman on the date of commencement of the Act as a limited owner, into an absolute estate. In the case of her death intestate she becomes a fresh stock of descent and the property devolves by succession on her own heirs. This section implements the concept of Indian Constitution of equality of sexes.

Effect of Section 14: Section 14 of the Act contains revolutionary provisions in respect of Hindu woman's property rights and is a step towards gender justice. 'The effect of the rule laid down in this section is to abrogate the stringent provisions against the proprietary rights of a female which are often regarded as evidence of her perpetual tutelage and to recognize her status as independent and absolute owner of property.'

Before the enactment of this Act, the Hindu woman's property commonly known as Stridhan was of two kinds: (i) absolute property, and (ii) limited estate. She had the absolute right to deal and dispose off the former kind of property but with respect to limited estate, no such rights were available. It was a peculiar kind of property almost unknown in any other system of jurisprudence. The present Act has conferred absolute ownership on Hindu females with respect to also that kind of property which was known as her limited estate. In this way, this section has enlarged the limited estate of Hindu woman into her absolute property. Moreover, the pre-Act textual and judicially developed law of woman's limited estate, which was very complicated, has now been simplified. It may be noted that the enhancement of woman's limited estate into absolute interest is within the spirit of the Constitution of India, and is not violative of fundamental right (to equality) guaranteed under Articles 14 or 15(1) of the Constitution.

From a plain reading of Section 14(1) it is clear that the estate taken by a Hindu female under that provision is an absolute one and

is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu Law. In *Sukhram v. Gauri Shanker* (AIR 1968 SC 356), their Lordships of the Supreme Court held that though a male member of a Hindu family governed by the Banaras School of Hindu Law is subject to restriction qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restriction. It has also been held by the Supreme Court, that Section 14 clearly says that the property possessed by a female Hindu on the date of the Act came into force whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu Law texts or rules. Those texts or rules cannot be used for circumventing the plain intendment of the provisions.

Section 14 is Retrospective: Section 14 is retrospective in so far as it enlarges a Hindu Woman's limited estate into an absolute estate even with regard to property inherited or held by her as limited owner at the time when the Act came into force. But the section has no application to the properties of female Hindu which she had inherited before the Act came into force and had already alienated absolutely before the Act, for she cannot be deemed to be the owner of the property of which she made an absolute alienation and was not in possession at the date of the commencement of the Act. The section applies only to properties 'possessed by' the female at the date of the commencement of the Act. The expression 'any property possessed by a female Hindu' in Section 14 means "any property owned by a female Hindu" at the date of the commencement of the Act, and these words are prospective in their application. Any property acquired before the commencement of the Act shall be the absolute property of the female, provided it was in her possession at the date of the commencement of the Act. The expression whether acquired before or after the commencement of this Act shows that section is operative retrospectively.

Illustration: A Hindu widow who was in possession of lands belonging to her deceased husband in 1917 but who was illegally

dispossessed by the collaterals of her husband in 1954 brought a suit for possession. During the pendency of the suit, the Hindu Succession Act, 1956, came into force and subsequently in 1958 the widow died and her legal representative was brought on record.

Held, that the land was possessed by the plaintiff when she died in 1958 within the meaning of Section 14(1) and, therefore, her legal representative must be deemed to have succeeded to those rights. The court laid down that word 'acquired' in sub-section (1) has to be given the widest possible meaning. This would be so because of the language of the Explanation which makes sub-section (1) applicable to acquisition of property in manners mentioned therein.

Lecture-XI: Succession to the Property of a Hindu Female

The Hindu Succession Act, 1956 introduced fundamental changes in the concept of woman's property. Section 14 of the Act removed the distinction between Stridhan and woman's estate and converted existing woman's estate into absolute property or Stridhan by conferring on her, absolute rights.

Sections 15 and 16 of the Act lay down the provisions relating to the devolution of the property of a Hindu female dying intestate. For this purpose, the property of a Hindu female is categorised under the following heads:

1. Property inherited by a female from her father or mother;
2. Property inherited by a female from her husband or father in law; and
3. Property obtained from any other source, by inheritance or otherwise.

It is to be noted that the above classification/categorisation among her property is immaterial if she dies intestate leaving behind her children or any descendant.

Section 15 of the Act lays down the *"General Rules of succession in the case of a female dying intestate"* and Section 16 provides for the *"Order of succession and manner of distribution among heirs of a female Hindu"*.

Section 15 — (1) The property of a female Hindu dying intestate shall devolve according to the rule set out in Section 16:

a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
b) secondly, upon the heirs of the husband;
c) thirdly, upon the mother and father;
d) fourthly, upon the heirs of the father, and
e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1):

a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father, and

b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any person or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

Section 15 does not apply to that property which is held by a Hindu female with restricted rights (in view of sub-section (2) of Section 14) at the time of her death. It applies to cases where the Hindu female has become a fresh stock of descent.

The words 'son' and 'daughter' of the deceased in Section 15(2) of the Act can only mean a son or daughter of the female, dying intestate, born to her of any husband, former or later. The definition includes even illegitimate children but does not include step-children, who will not be able to inherit their step mother.

In *Gurnam Singh v. Smt. Asa Kaur*(AIR 1977 Punj. 104), the Punjab High Court held that the plain and natural implication of the words 'son or daughter of the deceased' in sub-section (2) of Section 15, is that the son or the daughter should be heirs, even though she might have married once or more than once and may have, thus given birth to children from these marriages, because these off-springs are capable of establishing their blood relation to the female Hindu as son or a daughter.

In *Lachman Singh v. Kirpa Singh* (AIR 1987 SC 1616), the Supreme Court held that in absence of heirs mentioned in Section 15(1)(a) the heirs mentioned in clause (b) of Section 15(1) succeed.

Among the heirs of clause (b) will come the step-son of the Hindu female as her husband's heir. It is obvious that in presence of a son, step-son cannot inherit.

According to Sec.15(1) of the Act, the heirs of a Hindu female are divided into five categories called "Entries". Rule 1 of Sec.16 states that "those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

As stated above, 5 types of heirs are recognised in case of the succession of the female's general property. In case, she dies intestate leaving no children, the question arises is: what type of property she was holding at the time of her death. If it is general property it goes completely to her husband or any other heir as per priority under Section 15(1) entries a to e (as stated above).

If the property on the other hand, comes from her father or mother, it goes to the heirs of her father in the absence of children. If the property comes from the husband or her father-in-law, it devolves upon the heirs of her husband in the absence of children.

Section 16 provides for the order of succession and manner of distribution of property among heirs of a female Hindu intestate. It runs as follows–

Section 16 – The order of succession among the heirs referred to in Section 15 shall be, and the distribution of the intestate's property among those heirs shall take place, according to the following rules, namely:

Rule 1 – Among the heirs specified in sub-section (1) of Section 15 those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2 – If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter shall have taken if living at the intestate's death.

Rule 3 – The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) sub-section (1) and in sub-section (2) of Section 15 shall be in the same order and according to the same rules as would have applied if the property had been father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

It is convenient to study both Sections 15 and 16 together, since they are supplementary to the general provisions enshrined under Section 15 of the Act.

Rule 1 merely lays down that if there are any heirs of the first entry they shall be preferred and take the property of a female propositus simultaneously. It is only after the exhaustion or incapacity of the heirs of a prior entry that heirs of a succeeding entry will be entitled to succeed. If there is even one heir of the first entry living or capable he will take the property of the female dying intestate and excludes all other heirs of any subsequent entry.

The expression 'shall take simultaneously' only means that two or more heirs will take at the same time, it does not indicate the quantum of share of the two or more heirs for this purpose one will have to refer to Section 19 of this Act. The simultaneous heirs take per capita and tenants-in-common and not as joint-tenants.

Rule 2 lays down that where any son or daughter of a female propositus has predeceased her, but had left surviving the propositus's grand-children by the said pre-deceased son or daughter, then the grand-children would succeed to the share of their father or mother, as the case may be, and the share of that deceased son or daughter would not be available for redistribution amongst the remaining children of the propositus. Rule 2 states that where children and eligible grandchildren co-exist the distribution of property will be per stripes and not per capita. For the purposes of distribution of property of a female, all her children, dead or alive, except those who might have died issueless would be taken into account and the property divided in equal shares among them. The share of any pre-deceased son

or daughter would be given (again) in equal shares to the children of such pre-deceased son or daughter.

The word 'pre-deceased' would not only imply the prior death of an heir, but would also include an incapacity disentitling that person from inheriting.

Rule 3 states that in the case of property passing to the heirs mentioned in entries (b), (d) and (e) on the death of a female propositus the property would descend as if, in the case of entry (b) succession opens with the death of the husband and to his property. Rule 3 creates a legal fiction whereby property actually belonging to one deceased person is presumed to be that of another deceased person who died earlier. Property of the female would pass as if the husband had died leaving the property and Section 8 would come into play; and in the case of entry (d), succession opens with the death of the father and to his property; or in other words property of the female would pass as if the father had died leaving the property and Section 8 would again come into play. And in the case of entry (e), succession opens with the death of the mother and to her property. In other words property of the female propositus would pass as if the mother had died leaving the property and in the case Section 15 would again come into play for the heirs of the mother would be those as are mentioned in Section 15 of the Act.

Thus Section16 of the Act lays down three rules which regulate preference among the heirs in five entries and the mode of distribution of property among heirs of each entry.

A.P. Amendment Act, 1986
(Andhra Pradesh Act No.13 of 1986)

Introduction: Even before the enactment of the Hindu Succession (Amendment) Act, 2005, the State of Andhra Pradesh enacted the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 (13 of 1986) w.e.f. 09-09-1985 which made the females equal with those of males.

Before the passing of the Act, women were not members of the coparcenary under the Mitakshara law and were not entitled to claim partition in coparcenary property. In order to eradicate this social ill, the A.P. Amendment Act was passed to ameliorate the conditions of women in Hindu society. This envisages/confers equal rights in Hindu women on par with the Hindu males so as to ensure the constitutional mandate, equality before law and equal protection of laws irrespective of sex.

In Andhra Pradesh, the State Legislature has passed the Act entitled 'The Hindu Succession (Andhra Pradesh Amendment) Act, 1986, to amend Section 6 of the Hindu Succession Act. The object of the Amendment is to confer on the daughter also a right by birth in Mitakshara Joint Hindu Family. In other words, the daughter gets an equal share with that of the son in ancestral property also. This Act improved the status of the Hindu Woman in Andhra Pradesh.

Illustration: Suppose father, F, son S, and daughter D, are the members of the Joint Family having ancestral property of 60 acres land. A dies leaving the property. In Andhra Pradesh as a result of A.P. Amendment Act, 1986, daughter gets equal share with that of the son i.e. 30 acres. In other States, Daughter gets only 15 acres i.e. half of the A's share of 30 acres.

The A.P. Amendment Act applies/extends to the State of Andhra Pradesh only. The Act confers on daughter, right to claim share in the coparcenary property. Chapter II.A containing Sections 29-A, 29-B and 29-C has been inserted in the Hindu Succession Act, 1956, applicable to the State of Andhra Pradesh by the Act 13 of 1986. Section 29-A, 29-B and 29-C read as follows:

Section 29-A: Equal rights to daughter in coparcenary property – Notwithstanding anything contained in Section 6 of this Act:

i) in a joint Hindu Family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son.

ii) a) at a partition such a Joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son:

Provided that the share which a pre-deceased child of a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter as the case may be.

b) the share allotted to a female at a partition shall be held by her, subject to the terms of the partition, as a full owner.

iii) when a partible property includes a dwelling house wholly occupied by members of the joint Hindu family, then notwithstanding anything contained in this Act, the right of a female coparcener to claim partition to the dwelling house shall not arise until the male coparceners choose to divide their respective shares therein, but the female coparcener shall be entitled to a right of residence therein if she is unmarried or has been deserted by or has separated from her husband or is a widow;

iv) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded

notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

v) Nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

Section 29-B: Interest to devolve by survivorship on death: When a female Hindu dies after the commencement of the Hindu Succession (A.P. Amendment) Act, 1986 having at the time of her death an interest in a Mitakshara coparcenary property, her interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that if the deceased had left any child of a pre-deceased child, the interest of the deceased in the Mitakshara coparcenary property shall devolve by the testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1 – For the purposes of this Section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property has taken place immediately before her death irrespective of whether she was entitled to claim partition or not.

Explanation 2 – Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of the deceased, had separated himself or herself from the coparcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

Section 29-C: Preferential right to acquire property in certain cases:

1) Where after the commencement of the Hindu Succession (A.P. Amendment) Act, 1986 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolve under Section 29-A or Section 29-B upon two or more heirs and anyone of such heirs,

proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation – In this Section 'Court' means the Court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other Court which the State Government may, by notification in the Andhra Pradesh Gazette, specify in this behalf.

After the Hindu Succession (A.P. Amendment) Act, 1986, the State of Tamilnadu enacted 'The Hindu Succession (Tamilnadu Amendment) Act, 1990 (Tamilnadu Act No.1 of 1990) w.e.f. 25-03-1989, following the similar provisions of the Andhra Pradesh Act.

After the Hindu Succession (A.P. Amendment) Act, 1986, the State of Maharashtra enacted 'The Hindu Succession (Maharashtra Amendment) Act, 1994 (Maharashtra Act No.39 of 1994)l, w.e.f. 22-06-1994, following the similar provisions of the Andhra Pradesh Act.

After the Hindu Succession (A.P. Amendment) Act, 1986, the State of Karnataka enacted 'The Hindu Succession (Karnataka Amendment) Act, 1994 (Karnataka Act No.23 of 1994), w.e.f. 30-07-1994, following the similar provisions of the Andhra Pradesh Act.

All these States Amendments gave equal rights to daughter a right and interest in the coparcenary property equally with that of a son. The same concept has been taken by The Hindu Succession

Amendment Act 2005 (Central Act No.39 of 2005). Now the States Amendments are not in function. Hence reading of the A.P. State Amendment, and particularly the Central Act No.39 of 2005, one can easily understand the changes brought by these Amendments, and write the necessary answer in the examination.

The Hindu Succession (Amendment) Act, 2005

[1]*(Act No. 39 of 2005)*

An Act further to amend the Hindu Succession Act, 1956

Be it enacted by the Parliament in the Fifty-sixth Year of the Republic of India, as follows:

1. Short title and commencement: (1) This Act may be called the Hindu Succession (Amendment) Act, 2005.

(2) It shall come into force on such date[2] as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 4: In Section 4 of the Hindu Succession Act, 1956 (30 of 1956) (hereinafter referred to as the principal Act), sub-section (2) shall be omitted.

3. Substitution of new section for Section 6: For Section 6 of the principal Act, the following section shall be substituted, namely:

'6 . Devolution of interest in coparcenary property: (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall:

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

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1. Received the amount of th President on 5-9-2005 and Pub. in the Gaz. of India, Ext. No 45- II, dt. 6-9-2005.
2. 9-9-2005.

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and:

(a) the daughter is allotted the same share as is allowed to a son;

(b) the share of the pre-deceased son or pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation: For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect:

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation: For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation: For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court.

4. Omission of Section 23: Section 23 of the principal Act shall be omitted.

5. Omission of Section 24: Section 24 of the principal Act shall be omitted.

6. Amendment of Section 30: In Section 30 of the principal Act, for the words "disposed of by him", the words "disposed of by him or by her" shall be substituted.

7. Amendment of Schedule: In the Schedule to the principal Act, under the sub-heading "Class I ", after the words "widow of a pre-deceased son of a pre-deceased son", the words "son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son" shall be added.

Lecture-XII: Disqualifications

Even before the passing of the Hindu Succession Act, 1956 the disqualifications for right of inheritance were recognised. The Act mentions certain disqualifications which debar certain heirs who are under such disqualifications, in succeeding to the property of the intestate.

Sections 24 to 28 of the Hindu Succession Act, 1956, deal with the disqualifications for claiming the right of inheritance as detailed below:

1. Remarriage of widow (Section 24)
2. Murder (Section 25)
3. Conversion (Section 26)

1. REMARRIAGE OF WIDOW (SECTION 24)

Before the Hindu Succession (Amendment) Act, 2005, Section 24 of the Hindu Succession Act laid down disqualifications from inheriting the property of an intestate to intestate's predeceased son's widow, the widow of a predeceased son of a predeceased son of the intestate, or the widow of a brother of the intestate, if on the date of the succession opened, she had remarried. Section 5 of the Hindu Succession (Amendment) Act 2005 has omitted this section. Therefore, remarriage by these widows is no longer a disqualification.

Therefore Sections 25 and 26 of the Hindu Succession Act, 1956 lay down the provisions relating to disqualifications to inherit the property of a dying intestate in respect of murder and conversion respectively.

2. MURDER (SECTION 25)

Section 25 disqualifies a murderer from inheriting the property of the person murdered. Section 25 runs as follows:

Section 25 – A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent.

A person, who commits murder of the deceased or a person, who abets the murder of the deceased, or a person, who accelerates the commission of murder, is disqualified from inheriting the property. Accelerating the commission means killing the person having the nearer relationship with the deceased. For instance, P is on the death bed. P has a daughter D and daughter's son DS. DS kills D to inherit the property immediately on the death of P.

In *Minoti v. Sushal Mohan Singh* (1982 Bom. 68), it was held that the word 'murder' as used in Section 25 of the Hindu Succession Act must be construed in its popular sense and not in its technical sense as defined in the Indian Penal Code and would include culpable homicide or unlawful manslaughter.

When a person who had participated in a murderous attack on his father along with others who were convicted of murder in that case, was given benefit of doubt and was convicted under Section 324 I.P.C. instead of Section 302 I.P.C. even then the disqualifications mentioned in Sections 25 and 27 will come into play and operate against that person inheriting or deriving any beneficial interest in the property possessed or held by his father (*N.Seetharamiah v. Ramakrishnaiah*, AIR 1970 AP 407; *Kenchava v. G.Chanappa*, 51 IA 368; *V.Mudaliar v. Vedammal*, ILR 27 Mad. 59).

If a person charged with murder is acquitted, the acquittal removes the disqualification. It was so held in *Chammanlal vs. Mohanlal* (AIR 1977 Delhi 97.)

Section 25 of the Act applies to both intestate and testamentary succession. One must note that under Section 25 of the Act, only the murderer is disqualified, and his descendants, if they have not in any way participated in the crime, are not disqualified.

In *Stanumurthiayya v. Ramappa* (AIR 1942 Mad. 277)l, 'A' killed her mother and it was held that 'A's son (daughter's son) was in his own right a preferable heir compared to the last male-holder's brother's son.

In *Vallikanna . R.Singapernumal and others* (AIR 2005 SC 2587), the court observed that when the only son being a coparcener in the joint Hindu family governed by Mitakshara law murdered his father, who died intestate, the son would be totally disqualified from inheriting any interest in the coparcenary property and would be deemed to have predeceased his father and in fresh stock of line of descent would cease to exist. If he is the sole male survivor in the family, he having incurred such disqualification, his wife who succeeds through him cannot also lay a claim in the property.

In *Chaman Lal v. Mohan Lal* (AIR 1977 Delhi 97), 'A' claimed to succeed to her husband's property and the brother of her deceased husband objects on the ground that 'A' was unchaste and was charged with murder of her husband though she was acquitted by giving her the benefit of doubt. It was observed that the acquittal by the criminal court is decisive and 'A' cannot be disqualified under Section 25 of the Act. The disqualification of unchastity applies only under the pre-Act law and the old law no longer holds good and unchastity is no bar to inheritance and 'A' is, therefore, eligible to succeed.

In *Sitaramaiah v. Rama Krishnayya* (AIR 1970 AP 407), a person participated in the attack on his father along with others who were convicted of murder but he was given the benefit of doubt and convicted under section 304 IPC, it was held that he was disqualified under Section 25 of the Act.

If a person is found guilty of rape of a woman and the woman dies later (not as a consequence of the rape) even the justice, equity and good conscience may perhaps require that such a person should not be allowed to inherit.

3. CONVERSION (SECTION 26)

In olden days, conversion was a bar to inherit property. This disqualification was removed by Caste Disabilities Removal Act, 1950. Section 26 of the Hindu Succession Act, 1956 deals with the disqualification of descendants of a Hindu dying intestate to inherit on the ground of conversion to another religion. It runs as follows:

'Where, before or after the commencement of this Act a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindu at the time when the succession opens.'

The Hindu Succession Act applies to Hindus only. If a Hindu converts to Christianity, before the conversion, he was governed by the Hindu Succession Act as he was a Hindu. After the conversion, he is to be governed by the rules of Christianity. Children born after the conversion, are disqualified from inheriting property from their Hindu relatives. This disqualification applies to the children of the convert only.

Section 26 of the Hindu Succession Act, 1956 provides that where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

Thus conversion of an heir is not bar to succession. But the children of a Hindu convert to a non-Hindu religion cannot inherit. But if such children or descendants are Hindu at the time when succession opens then they can succeed. Thus, off springs also become disqualified to inherit the property unless they become reconverts to Hinduism at the time of intestate's death.

The Act does not deal with the question as to what constitutes conversion into another religion. The question whether a person is a convert has to be decided with reference to the general law.

'Ceasing to be a Hindu' means embracing Muslim, Christian, Parsi or Jew religion. However, when a Hindu becomes a Jain, Sikh or a Buddhist or Vice Versa that does not amount to ceasing to be a Hindu; he remains a Hindu in such cases.

SUCCESSION, WHEN A HEIR IS DISQUALIFIED (SECTION 27)

Section 27 states that the property shall devolve, as if the person disqualified, had died before the intestate. Therefore, the disqualified person, not being in existence, is excluded from inheritance. At this stage it is better to reproduce Section 27 of the Act:

'If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate'.

Thus, Section 27 of the Act disqualifies the heir if he is the murderer of the propositus, but it does not disqualify the murderer's heir.

Example:- A murdered his father P. A has a son B. Law disqualifies A from inheriting property, but not his (A's) son B. If A dies first and later P dies, B can inherit the property of P (i.e., the deceased grand father).

Sections 25 and 26 of the Act relate to a murderer heir and a convert heir. Section 27 of the Act is a supplement to Sections 25 and 26 of the Act in that it explains the status of such qualified person. Section 27 of the Act is prospective and retrospective.

DISEASE, DEFECT ETC. ARE NOT DISQUALIFICATIONS (SECTION 28)

According to Section 28, of the Hindu Succession Act, 1956, no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. Further, deaf and dumb, want of limb or organ, congenial impotency, lunacy, idiocy, leprosy etc. are not disqualifications to inherit the property.

Under the old Hindu Law, person suffering from deafness, dumbness, lunacy, idiocy, leprosy, congential and incurable blindness and other incurable diseases, were excluded from inheritance. The Hindu Inheritance (Removal of Disabilities) Act, 1928, removed all these disqualifications except lunacy or idiocy from the birth. This Act, by Section 28, has declared that defect, disease, deformity, etc. shall not disqualify a person from inheriting the property. The only

disqualifications under the Act are those mentioned in Sections 24 to 26. Unchastity of a female heir also is no disqualification under this Act. Section 28 runs as follows:

'No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever'.

The Madras High Court has held that the effect of Section 28 read with Section 4 of the Act is that the unchastity of a widow has ceased to be a disqualification for succession after the Act came into force. Widow though, unchaste can now succeed to the property of her son as her father's widow.

CERTAIN WIDOWS RE-MARRYING ARE NOT DISQUALIFIED NOW AS SECTION 24 OF THE ACT IS OMITTED

Section 24 of the Hindu Marriage Act, 1956 states that any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, has remarried.

Section 24 of the Act lays down a disqualification for succession, against:

i) the widow of a predeceased son;

ii) the widow of a predeceased son of a predeceased son;

iii) the widow of a brother of a Hindu intestate.

if such widow has remarried on the date when the succession opens.

However, Section 24 of the Act has been omitted by the Hindu Succession (Amendment) Act, 2005 (39 of 2005) with effect from 09-09-2005. Hence the mentioned three categories of widows in Section 24 can inherit even if they have remarried.

Thus as per discussions held above following are disqualified from inheriting the property of the deceased intestate.

i) Murderer.

ii) Abetter to murder.

iii) Convert's descendants.

But following are not disqualified from inheriting the property of the deceased intestate.

i) Certain widows remarrying before death of intestate (from 09-09-2005).

ii) Unchaste woman.

iii) Convert heir.

iv) Heir suffering from a disease.

v) Widows remarrying after the death of the intestate.

DOCTRINE OF ESCHEATMENT (SECTION 29)

According to Section 29 of the Hindu Succession Act, 1956, if there are no heirs i.e. in the absence of Class-I heirs or Class-II heirs or Agnates or Cognates to the deceased, the Government will take the property. This is known as *'Doctrine of Escheatment'*.

The expression 'Escheat' means "lapsing of property to the sovereign or state in the event of the death of a owner intestate leaving no legal heir behind." In other words, the term 'escheat' is employed to denote lapsing of property to the Government in the absence of legal heirs of a deceased intestate.

According to Mitakshara and Dayabhaga, the king (State) can take the property of a kshatriya or any other lower tribe, but can not take the property of a Brahmin. Manu's text also says that a Brahmin's property cannot be taken. According to Narada Smruti, the property of a Brahmin if he has no heirs goes to another Brahmin. The Privy Council held that, in the absence of the heirs, the property goes by escheatment to the king, whether the deceased was a Brahmin or non-brahmin.

Section 29 of the Act provides that in case of failure of heirs specified in Sections 8 and 15 of the Act, on the death of intestate, the property will devolve on the Government. The Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

The question of escheat arises:

i) When a Hindu intestate has left no legal heir.

ii) When the intestate has left an heir who, in view of Sections 25 to 28 of the Act, is statutorily disqualified from succeeding.

However, where the property is disposed of by a valid will by the deceased Section 29 of the Act has no application.

The provisions of Section 29 of the Act are now very rarely invoked because the Act lays down such an extensive list of heirs. Moreover operation of the section can be successfully avoided by making a will of the property.

In all cases of escheat, the burden is on the Government to prove that there are no heirs to the intestate before the Government claims that property. Though Section 29 of the Act does not indicate which state would be entitled on escheat in view of Article 296 of the Constitution the property would vest in the state in which the property is situated.

Obligations may be charges created for the maintenance of dependants and liabilities may be payments of debts binding on the property created by mortgages or other contracts. There will also has to be discarded by the Government on the Government taking the property by escheat.

Lecture-XIII: General Rules of Succession

The general provisions relating to succession are enshrined under Sections 18 to 28 of the Hindu Succession Act, 1956. Sections 18 to 23 contain general rules of succession, while sections 24 to 28 of the Act deal with disqualifications to inherit the property of a Hindu dying intestate. Sections 24 to 28 dealing with the disqualifications have been discussed in the previous chapter, Lecture-VII, while Sections 18 to 23 dealing with the general rules of succession are discussed in this chapter. The rules laid down in these sections are supplementary to the provisions enshrined in Sections 5 to 17 of the Act. Sections 18 to 23 dealing with the general rules of succession are detailed hereunder,

1. Full blood preferred to half blood (S.18).
2. Mode of Succession of two or more heirs (Per Stripes and Per Capita Rules) (S.19).
3. Posthumous Child or a Child in the womb (S.20).
4. Presumption in case of simultaneous deaths (S.21).
5. Preferential Right or the Right of Pre-emption (S.22).
6. Partition of Dwelling House (S.23).

1. Full blood preferred to half blood (Section 18): Sec.18 of the Act lays down that the heirs related to the propositus (deceased) by full blood shall be preferred to heirs related by half blood if the nature of relationship is the same in every other respect.

A full-blood relationship is one which is traced through both parents (children of the same father and the same mother) are brothers of the full-blood and a half blood relationship is one which is traced through one parent only. A step son in relation to his father or mother cannot be said to be related by half-blood. A step son is not related to his step mother or step father. Under the Act, children by different wives are half-brothers or half-sisters, but children by different husbands are not half-relations, they are uterine brothers or uterine sisters.

The words full-blood and half-blood have been explained in Section 2(e) of the Act. Two persons are said to be related to each other by full-blood when they are descended from a common ancestor by the same wife, and by half-blood when they are descended from a common ancestor but by different wives.

Section 18 makes it clear that the heirs related by full-blood shall be preferred to heirs related by half-blood, provided the nature of the relationship is the same in every other respect. Thus, the full sister's daughter shall be preferred to half brother's son. Similarly a full sister excludes a half sister.

The Bombay High Court in the case of *Vamam Govinda Shindor v. Gopal Babu Chakradeo* (AIR 1976 Bom. 375) overruled *Purushottam Raman Gokhale v. Srivad Ram Chandra* and held where the question of succession between the real sister and cousin sister arises, the real sister (sister by full blood) would exclude the cousin (sister by half blood). Where the male and female heirs are of the same degree, no discrimination shall be made and they will inherit the property together and divide equally.

Similarly in *Narayan v. Puspa Ranjini* (AIR 1991 Ker. 10)l, the Kerala High Court held that where there is question of succession between sister by full blood and brother by half blood, the sister by full blood shall exclude the brother by half blood.

Similarly, when there are half blood and uterine blood relations, the half blood relation will be preferred.

In *Yelleva Gounder vs. Lakshmi,* AIR (1975) Mad. 253 — It was held that the full sisters exclude the half sister. Similarly in *Sarvan Singh vs. Dhankaur,* AIR 1971 Pand, 323 — It was held that full blood sisters would exclude the half blood brothers.

2. Mode of Succession of two or more heirs (Per Stripes and Per Capita Rules : Section 19): Section 19 of the Act provides – 'If two or more heirs succeed together to the property of an intestate they shall take the property:

a) Save as otherwise expressly provided in this Act, per capita and not per stirpes, and

b) As tenants in common and not as joint tenants.'

The section lays down the general rule of distribution that two or more heirs of a male or female intestate who succeed together under the Act take the property per capita and as tenants in common and not per stirpes unless the law provides contrary to it.

In case of per capita distribution of the intestate's property, each claimant has a share in his or her own right. For instance where a question of succession arises between a male intestate's brothers and sisters and son's daughter's son and son's daughter's daughter, they all shall succeed together and each shall take equal share.

In *Sundermal v. Sadasiva* (AIR 1959 Mad. 349), it was observed that after the commencement of the Hindu Succession Act, the Co-widows, two or more than two daughters will inherit the property as tenants in common, which on their death will go to their own heirs. Since co-widows enjoy the status of tenants-in-common, either of the two will be entitled to bring a suit to get the trespasser expelled.

In *Govindareddy v. Obulamma* (1971 AP 363 (FB), it was observed that where a father died leaving a son, a widow and a daughter they take as tenants-in-common the interest of the father in the joint family property, and thereafter the son would have no right to alienate that property even though he is a karta and the alienation would not be binding on the widow and the daughter.

In *Shanmugha sundaram and others v. Diravia Nadar (dead) by LRs and another* (2005) 10 SCC 728), where the property was jointly inherited by two brothers and three sisters as heirs under the Act and hence co-owners, in the absence of partition between them the two brothers together had an undivided share in the property, and therefore, they were held not to have agreed for sale of the entire property, and that they were competent to execute agreement to the extent only of their undivided share. In the event of sale of such undivided share, the vendee would be required to file a suit for partition to work out his right in the property. The left-out three sisters as co-owners having undivided share in the whole property, the two brothers were held incompetent to abide by the arbitration award governing the brothers and their vendee.

3. Posthumous child or a child in the womb (Section 20): Section 20 of the Act, recognizes a posthumous child or a child in the womb as a heir. A child, who was in the womb at the time of the death of an intestate and was born alive subsequently shall have the same right to inherit as if he/she had been born before the death of the intestate.

A child in mother's womb is presumed to be born before the death of the intestate, although born subsequently. In the words D.F.Mulla, 'It is by fiction or indulgence of the law that the rights of a child born in justo matrimonio are regarded by reference to the moment of conception and not by birth and the unborn child in the womb if born alive is treated as actually born for purpose of conferring on him benefits of inheritance.

According to the section, a child in womb will inherit only if:

i) The child was conceived at the time of death of the intestate, and

ii) The child is born alive subsequently.

If both the above conditions are fulfilled, the child will inherit in the same manner as if he were born before the death of the intestate. Any child, male or female who is in mother's womb at the time of death of the intestate will be deemed to have come in existence in the eyes of law and after his birth will divest any person of the property which temporarily vested in such person during his absence.

4. Presumptions in case of simultaneous deaths (Section 21): In an accident (road, rail, air, water or other) two or more persons of the same family may die simultaneously, then doubt arises as to whoever died earlier. Section 21 of the Act clears this uncertainty by laying down that "where two persons have died in circumstances rendering it uncertain, whether either of them, and if so which survived the other, then for all purposes affecting succession to property it shall be presumed until the contrary is proved, that the younger survived the elder". In simple words, when two persons die simultaneously, the presumption is that the elder died first and the younger survived.

Section 21 of the Act applies to cases of simultaneous deaths as well as to deaths of two persons one after the other where it is not known or proved who died earlier. Thus presumption applies to both intestate and testamentary successions.

For example a father and a son die in air crash. In this case son being younger to father is presumed to have survived father.

In *Padmaraja Setty v. Gyanchandrappa* (1970 Mys 87), where a mother and daughter were murdered on the same night and it could not be ascertained who died first, it was decided that younger (daughter) survived the elder (mother) applying Section 21 of the Act.

In Mahaber Singh's case (AIR 1969 Punj 66), where testator and his wife (who was younger to him in age) died simultaneously of gunshot wound, it was held that the wife should be presumed to have survived the husband testator.

In *Jayantilal v. Chhanalal* (AIR 1968 Guj 212), where mother and daughter died in a fire and there was no evidence as to who survived the other, it has been held that the daughter (being younger) survived mother and on the death of the daughter the property which devolved upon her would go to her heirs.

5. Preferential Right or Right of Pre-emption (Section 22): Section 22 provides a preferential right to other heir or heirs to acquire property when one of them desires to transfer his or her interest in the property inherited. Section 22 runs as follows:

(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolve upon two or more heirs specified in Class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by

the court on the application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

(3) If there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation: In this section, 'Court' means, the court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other court which the State Government may, by notification in the official Gazette, specify in this behalf.'

The expression 'Pre-emption' means 'Preferential Right'. "Where two or more heirs succeed simultaneously to immovable property or business of a Hindu male as Class-I heirs and if one heir wants to dispose of his share and the other wants to purchase/ acquire the same, he/she (the latter) shall be given preference over others". In simple words, the heir, who wants to dispose of his share, shall offer first to co-heir/heirs and then to outsiders". Such priority or right conferred on the co-heir is called "the preferential right or the right of pre-emption".

Section 22 of the Hindu Succession Act, 1956 lays down that "when heirs simultaneously succeed to immovable property or business of a Hindu male as Class-I heirs and if any of heirs wants to dispose of his or her share in the immovable property or business, the other heirs will have a preferential right to acquire that right". The price of such property may be agreed upon between the co-heirs. In case, they fail to arrive at an agreement, the price may be fixed by the court on the application of any party. If more than one heir wants to purchase, one, who offers the highest price, will have the right to purchase it. If the property is sold without making an offer to co-heirs, the transfer/sale is voidable at the instance of any co-heir.

In *Nagammal v. Nanjammal* (1970) MLJ 358) Natisan J. said

that Section 22 embodies two fold aspects of right of pre-emption viz. (i) the primary and substantive right to have an offer made, and (ii) the secondary or remedial right of the co-heirs if the property is sold without being first offered to him to take it from the purchasers. The right is personal and is not attached to property.

In *Krishna Pada Roy v. Parimal Chandra Saha* (AIR 2000 Gau 117), it has been observed that the right of the pre-emption cannot be claimed if there was partition already.

6. Partition of Dwelling House (Section 23): Section 23 of the Hindu Succession Act has been omitted by Section 4 of the Hindu Succession (Amendment) Act, 2005. Before the omission by the Hindu Succession (Amendment) Act, 2005 (Act No.39 of 2005 w.e.f. 09-09-2005) Section 23 made special provision in respect of partition of a dwelling house.

[According to Sec.23 of the Act, where a Hindu intestate has left surviving him/her both male and female heirs as specified in Class-I of the Schedule (ie. Class-I heirs viz. son, daughter in law, daughter, mother etc.) and his/her property includes dwelling house wholly occupied by members of his/her family, the female heir/heirs can not claim partition of the dwelling house until the male heirs choose to divide their respective shares therein, but the female heirs shall be entitled to a right of residence therein, provided that, where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted or has separated from her husband or is a widow. So long as there is a male heir, female heir cannot seek partition (as laid down in *Patil vs. Koltia,* AIR 1985 Ori. 70 and *Punwasi vs. Sukhadevi,* AIR 1986 All. 139).

It is to be noted that if part of the dwelling house is let out to tenants, the restriction on the female heirs does not apply. (i.e. the female can ask partition if a part of the house is left out) as held in the case of *Usha vs. Smriti* (1988) Cal. 115. (In simple words, Section 23 lays down that, "where a Hindu intestate (male or female) has survived both male and female heirs under Class-I of the Schedule

(i.e. Class-I heirs viz. son, daughter, widow, mother etc.) and property, which includes a dwelling house, wholly occupied by his/her family members, any female heir can not ask partition of the dwelling house until it is shared by the male heirs. However, the female heirs are entitled to the right of residence. If the female heir is the daughter, she is entitled to the right of residence provided she is unmarried or has been deserted or has separated from her husband or she is a widow. The restriction under Sec.23 over the female heirs shall not apply, if a part of the dwelling house is let out to tenants).

It is clear from the above that, a female heir cannot ask partition of the dwelling house until it is shared/partitioned by the male heirs. Now, the question arises is, whether the provision under Sec.23 applies even when there is only one male heir? If there is only one male heir there can be no prospect of the male heirs effecting a partition. However, if a son is born to single male heir, partition can be possible between the male heir and his son. Further, the words 'male heirs' used in Sec.23 denotes plural and the word plural includes singular under the General Clauses Act and hence the rule Under Sec.23 is applicable if there is no repugnancy in the context.

In *Surya Kumar vs. Madya Dulla*, AIR (1982) Cal. 222, it was laid down that the plural includes the singular and applied Sec.23 even when there is only one son (male heir) and daughters (female heirs). This view was followed by the Madras High Court in *Janabai vs. Palani*, AIR (1981) Mad. 62. But the contrary view was taken by the Bombay High Court in *Anant vs. Janaki Bai* AIR (1984) Bom. 319 and the Orissa High Court in *Hemalatha vs. Uma Shankar* AIR (1975) Ori. 208.]

CHANGES BROUGHT ABOUT BY THE HINDU SUCCESSION ACT, 1956

The Hindu Succession Act, 1956 brought about fundamental changes in the Old Hindu Law of succession. Following are some of the important changes:

1. In the Old Law of Succession (i.e. the pre-existing law) there were two schools governing the Hindu Succession viz. Mitakshara

and Dayabhaga. The Hindu Succession Act, 1956 made the two schools into a uniform system.

2. In old law, there was a distinction between male and female heirs, but the Hindu Succession Act, 1956 makes no distinction between male and female heirs.

3. Earlier i.e. under the old law, a coparcener could not make a will in respect of his interest in the joint family property. The Act of 1956 removed this restriction and confers on coparcener, a right to execute a will in respect of his interest in the joint family property.

4. Under the old law, the rule of preference is based on right to offer pinda or propinquity of blood, but the order of succession provided by the Act is based on the concept of love and affection.

5. Under the old law simultaneous succession of different types of heirs was not recognized. Now class I heirs take simultaneously under the Hindu Succession Act.

6. The Act of 1956 confers on certain female heirs, right to succeed to the interest of a Mitakshara Coparcener. There was no such right under the old law.

7. Sec.12 of the Act, has placed agnates and cognates under third category of heirs (i.e. next to Class-I and Class-II heirs) and arranged their order of succession/preference to succeed systematically and removed the uncertainty and confusion under the old law.

8. Under old law, when a coparcener died, the principal of survivorship operated and the female heirs viz. the widow or daughter or mother or daughter of the predeceased son or daughter of the predeceased daughter could not inherit. This position is remedied under the Act of 1956 (Sec.6).

9. Under the old law, both the male and female heirs could not succeed simultaneously. The Act of 1956 provides for Class-I heirs comprising of both male and female heirs to succeed simultaneously.

10. Under the old law, the property of a female Hindu was divided into two heads namely: (a) Stridhan; and (b) Woman's estate. The

Act of 1956 abolished Stridhan and woman's estate. Sec.14 of the Act, confers on a female Hindu, absolute right on woman's property. Now, the property of a female Hindu is called 'Stridhana' or 'Absolute property' as she is the absolute owner of the property.

11. The Act of 1956 brought about certain changes in respect of compact series of heirs under old law. The Act of 1956 placed some of the heirs of compact series viz. wife, daughter, mother, son of predeceased daughter under Class-I heirs, some other heirs of the compact series viz. father, brother and brother's son under Class-II heirs and the brother's son's son from the compact series has been included under Agnates (i.e. the third category of heirs under the Act).

12. Under old law of succession, there was a system of impartible estate. But the Hindu Succession Act abolished the impartible estate not created by statutes.

13. Under old law of succession, there was no uniform order of succession. But, Section 8 of the Hindu Succession Act provides for the uniform order of succession governing the property of a male Hindu and Section 15 of the Act provides the uniform order of succession governing the property of a female Hindu.

14. Under the old law, benefit under the principle/doctrine of representation was confined to sons, grand-sons and great grand-sons of the predeceased sons. The Act of 1956 extended the benefit under the principle of representation to the children of predeceased daughters and also to daughters of predeceased sons and daughters of a pre-deceased son of a predeceased son and also to the widow of a predeceased son and the widow of a predeceased son of a predeceased son.

15. Section 20 of the Act, confers on child in womb, a right to inherit to the intestate as if he/she had been born alive before the death of the intestate. Such right was not recognised under the old law.

16. Under the old law, the rights of illegitimate child depended upon the caste to which the parents belonged and also varied from

school to school. The Act of 1956 has recognised the illegitimate kinship only with reference to the mother for the purposes of inheritance.

17. Under the old law, lunacy and idiocy and unchastity of a widow were disqualifications for inheritance. The Act of 1956 removed the above disqualifications.

MARUMAKKATTAYAM AND ALISANTHANA LAWS OF SUCCESSION

Section 17 – The provisions of Sections 8, 10 and 23 shall have effect in relation to persons who would have been governed by the Marumakkattayam law or Aliyasantana law if this Act had not been passed as if:

i) for sub-clause (c and (d) of Section 8, the following has been substituted, namely — (c) if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates.

ii) For clauses (a) to (e) of sub-section (1)of Section 15, the following had been substituted, namely:

a) Firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother,

b) Secondly, upon the father and the husband,

c) Thirdly, upon the heirs of the mother,

d) Fourthly, upon the heirs of the father,

e) Lastly, upon the heirs of the husband.

iii) Clause (a) of sub-section (2) of Section 15 had been omitted.

iv) Section 23 had been omitted.

Succession to property of male: Clause (1) of the Section substitute a clause (c) in Section 8 in place of clauses (c) and (d).

According to this substituted clause, agnates and cognates succeed together and the agnates do not get preference over the cognates. The preference shall be determined in accordance with

the provisions of Section 13. The order for purposes of Section 17 is as under:

i) Heirs specified in class I of the Schedule.

ii) Heirs specified in class II of the Schedule.

iii) Agnates and Cognates.

Succession to property of female: In place of clauses (a) to (c) of Section 15 new clauses (a) to (c) have been substituted: The changes have been specifically contained in clause (ii) of Section 17. In this connection it is noteworthy that the order mentioned in Section 15(1) and the provisions of clause (2) of Section 15 have not been followed. In clause (ii) (a) of Section 15 the husband has been omitted. The heirs of the husband have been placed in the last. Section 23 has been omitted.

Marumakkattayam and Alisanthana laws are a body of custom and usage. There are no sacred writings binding on the followers of these systems. In other words, they are customary laws prevalent in the States of Kerala and Karnataka before 1956. These laws were passed by the States concerned and were also modified considerably (by the Malabar Marriage Act, 1896, the Malabar Wills Act, 1896, the Madras Marumakkattayam Act, 1932, the Mappilla Marumakkattayam Act, 1939, the Madras Aliyasanthana Act, 1949 and the Regulation of the State of Travancore-Cochin).

The term 'Marumakkattayam' means "sister's son. Under the Marumakkattayam Law of inheritance, the property of the deceased devolved upon his sister's son. Under this system, female is the head of the joint family called 'Tarwad'. However, all the family members are under the control of a male member called *'Karnavan'*. He has a power to alienate the Tarwad property under necessity. In the absence of a male member, the senior most female member can take up the management of the family. She is called *'Karnavathi'*. Just like a coparcenary within the coparcenary in a Hindu Joint Family, there is Tawazhi in the Tarwad. Tarwazhi means "a branch in the Tarwad".

Aliyasanthana system of inheritance was prevalent in Karnataka. Under this system, the property of the deceased will go to the daughter. The term 'Aliya' means "son in law". In this system, the joint family is called as 'Kutumba' and the branch of the joint family is called 'Kavuru'. The Aliyasanthana system differs from the Marumakkattayam in certain aspects. The tarward (Kutumba) may be managed by the eldest member even if such member is a female. This system is not applicable to Brahmins.

As the existing law of Marumakkattayam and Aliyasanthana was not satisfactory, the Hindu Succession Bill made provision for necessary reforms on the law of these systems.

Section 7 of the Hindu Succession Act, 1956 deals with devolution of interest in the property of a tarwad, tavaghi, kutumba and kavaru. It is applicable to a Hindu to whom the Marumakkattayam and Aliyasanthana law would have applied if this Act had not been passed.

Problems (Part : C)

1. X died in 1970 leaving his widow, mother, father, two daughters and three sons. Who are entitled to property under Hindu Succession Act and to what extent. (A.U Model Q.P, Part-C, Q.2, Marks: 20).

Ans: Instant problem refers to distribution of property of a Hindu male intestate.

Sections 8 to 13 of the Hindu Succession Act, 1956 lay down the provisions relating to devolution of property in respect of a male Hindu dying intestate.

(Special Note: As the problem carries 20 marks, the student has to answer the problem covering the relevant provisions under Sections 8 to 13).

In the present problem all the heirs except Father are Class-I heirs. Father, is a Class-II heir and is excluded as there are Class-I heirs. In other words, Father gets no share and the entire property is distributed among the Class-I heirs.

Section 10 of the Act provides for the distribution of property among the Class-I heirs.

Section 8 — According to Section 8 of the Act, when a male dies intestate, his property devolves as follows:

a) Firstly, upon the heirs specified in Class-I of the Schedule (Class-I heirs);

b) Secondly, if there are no Class-I heirs, the property devolves upon the heirs specified in Class-II of the Schedule (Class-II heirs);

c) Thirdly, in the absence of above two classes (i.e. Class-I and Class-II heirs), the property devolves upon the agnates, an agnate is a blood relation by birth or adoption through male relation, who do not come under Class-I or Class-II heirs;

d) Lastly, if there are no agnates, then the property devolves upon the cognates of the deceased. A cognate is a person related to the deceased wholly through the female link either by blood or by adoption.

In the absence of all the above, the property goes to the Government.

Class-I Heirs: Class-I heirs are 12 in number as stated below:

1) Mother;
2) Widow;
3) Daughter;
4) Son;
5) Widow of a predeceased son;
6) Son of a predeceased son;
7) Daughter of a predeceased son;
8) Widow of a predeceased son of a predeceased son;
9) Daughter of a predeceased son of a predeceased son;

10) Son of a predeceased son of a predeceased son;

11) Daughter of a predeceased daughter; and

12) Son of a predeceased daughter.

Shares of Class-I Heirs (Section 10): Section 10 of the Act deals with the distribution of property of the propositus among the Class-I heirs. The rules are:

Rule 1: The intestate's widow gets one share. In case the widows are two or above, all the widows together shall take one share.

Rule 2: The surviving sons, daughters and the mother of the intestate shall each take one share.

Rule 3: The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4: The distribution of the share referred to in Rule 3.

i) Among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion.

ii) among the heirs in the branch of the predeceased shall be so made that the surviving sons and daughters get equal portions.

Class-II Heirs: In the absence of Class-I heirs, the property devolves upon Class-II heirs as stated below under 9 categories:

Category - I Father

Category - II A. Son's Daughter's Son.

B. Son's Daughter's Daughter.

C. Brother.

D. Sister.

Category - III A. Daughter's Son's Son.

B. Daughter's Son's Daughter.

C. Daughter's Daughter's Son.

D. Daughter's Daughter's Daughter.

Category - IV A. Brother's Son.

B. Brother's Daughter.

C. Sister's Son.

D. Sister's Daughter.

Category - V A. Father's Father.

B. Father's Mother.

Category - VI A. Father's Widow.

B. Brother's Widow.

Category - VII A. Father's Brother.

B. Father's Sister.

Category - VIIIA. Mother's Father.

B. Mother's Mother.

Category - IX A. Mother's Brother.

B. Mother's Sister.

In the absence of all the heirs under Class-I, the chance comes to category I of the Class-II heirs i.e. Father, who gets the property completely. In his (Father's) absence, the chance comes to Category -II under Class-II heirs. In this category, there are four, who get simultaneously. Likewise in the absence of the preceding Category, the succeeding category will get the property. When the chance comes to a particular Category, all the heirs in that category will get the property simultaneously.

Likewise, in the absence of Class-I and Class-II heirs, the property devolves upon the Agnates. Like this: upon the Agnates i.e. male link relations other than those included in Class-I and Class-II of the Schedule.

Eg: Son's son's son; Brother's son's son; Father's brother's son etc.

In the absence of Class-I heirs, Class-II heirs and Agnates, the property devolves upon cognates i.e. female link relations other than those included in Class-I and Class-II of the Schedule.

Eg: Daughter's son; Sister's son; Sister's Daughter etc.

Distribution of Property: As per the rules enshrined under Sec. 10 of the Act stated above, the property of X in the instant problem may be distributed among his heirs as follows:

M		F	
		(X)	W
D1	D2	S1	S2 S3

All the above heirs except Father are Class-I heirs. Father, comes under Class-II heirs and is excluded as there are Class-I heirs. All the seven heirs as shown in the above diagram viz. Mother (M), Widow (W), Daughters (D1,D2) and Sons (S1, S2, S3) are entitled to one share each i.e. each gets 1/7th share.

(P.S :- In case the above problem is asked as short question, the student has to write the provisions/rules under Sec.8, Sec.10 and distribute the property according to Sec.10).

Problem: A Hindu dies leaving behind his parents, widow, two sons and three daughters. Assuming that he leaves behind his separate property worth Rs.8 lakhs, distribute the same among his heirs. (A.U. Oct./Nov.2000, Part-C, Q.1, Marks: 20).

(Clues : The contents of this problem are almost identical to the previous one except two sons in the place of three sons and three daughters in the place of two. Further, the worth/value of the property is given as Rs.8 lakhs. Out of 8 heirs, Father is Class-II heir and the remaining seven are Class-I heirs. When there are Class-I heirs, Class-II heirs i.e. Father is excluded. According to Sec.10 of the Act, the entire property of Rs.8 lakhs is to be distributed among the seven heirs under Class-I of the schedule. Each one gets one share: i.e. 1/7 = Rs.1,14,285/-).

Problem: A, a female Hindu dies leaving behind her husband, predeceased daughter's husband and a brother. Who will inherit her property. (A.U. Oct./Nov. 2000, Part-C, Q.3, Marks:20).

Ans: Instant problem refers to devolution of property in respect of a female Hindu dying intestate.

Sections 15 and 16 of the Hindu Succession Act, 1956 lay down the provisions relating to devolution of property of a female Hindu dying intestate.

Write now, the relevant provisions under Sections 15 and 16; and distribute the property according to Sec.15(1)(a).

B ——— (A) —— H

(D) ——— DH

According to Sec.15(1) of the Act, the property of a female Hindu dying intestate devolves as follows:

a) firstly upon her sons and daughters including the children of any predeceased son or daughter and husband (children and husband);

b) secondly upon the heirs of the husband;

c) thirdly upon the mother and father;

d) fourthly upon the heirs of the father; and

e) lastly upon the heirs of the mother.

In the present problem A (female Hindu) left behind her husband H, brother B and daughter's husband, DH. The heirs under entry (a) above excludes heirs under entry (b). The heirs under entry (b) excludes the heirs under entry (c) and so on. In the instant problem, only husband comes under entry (a) and is entitled to inherit/get the whole property.

QUESTIONS AND HOW TO ANSWER

(The Hindu Succession Act : Lecture-2 to Lecture-8)

Q) Woman's Estate. (A.U. Model Question Paper, Part-A, Q.No.1, Marks: 4).

Q) Notional Partition Theory . (A.U. Model Question Paper, Part-A, Q.No.2, Marks: 4).

Q) Intestate Succession (A.U. Model Question Paper, Part-A, Q.3, A.U.October/November 2000, Part-A, Q.6, Marks: 4).

Q) Agnates and Cognates (A.U. Model Question Paper, Part-A, Q.4, S.V.U, Nov. 1999, Part-A, Q.1, Marks: 4).

Q) Law of Marumakkattayam (A.U. Model Question Paper, Part-A, Q.8, Marks: 4),

Q) Marumakkattayam and aliyasanthana (N.U, April 1999, Part-A, Q.4, Marks: 4).

Q) Disqualifications to Succession. (A.U. Model Question Paper, Q.5, Marks: 4).

Q) Rule of Survivorship (A.U. Model Question Paper, Part-A, Q.9, S.V.U, November 1999, Part-A, Q.1, Marks: 4).

Q) Propositus (S.V.U. November 1999, Part-A, Q.3, Marks: 4).

Q) Escheat (S.V.U. November 1999, Part-A, Q.4, A.U. October/November 2000, Part-A, Q.9, Marks: 4).

All the above questions (1 to 10) are short questions, asked directly. The student has to precisely write his answer in a paragraph of 10 lines or one page.

Q) Explain the kinds of Blood Relationships. (A.U. July 2000, Part-A, Q.7, Marks: 4).

Ans: Write about Full Blood, Half Blood and Uterine blood in brief.

Q) There is a fundamental change in the concept of woman's property after 1986. Critically examine the changes with special reference to Andhra Pradesh Amendment to Hindu Succession Act of 1986. (A.U. Model Question Paper, Part-B, Q.1, Marks: 18).

Ans: Write about the concept of woman's property before 1956 (i.e. Stridhan and Woman's estate) in brief, woman's property after passing of the Hindu Succession Act, 1956 (i.e. Stridhan or Absolute Property) under Sec.14 in detail and its position with reference to A.P. Amendment Act in brief.

Q) Enumerate the 'General Provisions' relating to succession as laid down in Hindu Succession Act, 1956. Explain the changes effected by Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

Ans: Write the general rules of succession under Sections 18 to 23 and changes brought about under A.P. Amendment Act, 1986.

Q) Enumerate the Class-I heirs under Hindu Succession Act. (A.U. August 2001, Part-B, Q.4, Marks: 18).

Ans: Class-I heirs refers to succession of a male Hindu dying intestate.

Sections 8 to 13 of the Hindu Succession Act lay down the provisions relating to the succession of a male Hindu dying intestate.

Write now in brief the provisions under Sec.8 and explain in detail the heirs under Class-I of the schedule and shares/ distribution of property among Class-I heirs (Section 10).

Part VI

Lecture-XIV: The Family Courts

The Family Courts are designed for speedy trial and quick disposal of matrimonial disputes (i.e. the disputes between the husband and wife). In view of increase in the incidence of matrimonial disputes and increasing pendency of the cases in the civil and criminal courts, Judges, women organizations etc. requested the Central Government to pass a special legislation to deal exclusively with matrimonial matters. The Law Commission vide its reports 54 and 55 (1974) recommended the Government to pass a special enactment for establishment of Court/Courts to deal with family matters. As a result, the Family Courts Act was passed in 1984 for the establishment of Family Courts in India.

It will be brought into force only when the Central Government issues a notification in the Official Gazette, and different dates may be appointed for different States. In some States it has been brought into force in some cities.

In *M.P.Gangadharan v. State of Kerala* (2006 SC 2360), the Supreme Court has held that Family Court should be established not only because it is provided in the Act but the state must be alive to the situation that it has a duty to provide all infrastructure to the forum of dispute resolution.

Concept of Family Court: In some western countries, family courts are already functioning. Now it is accepted by most, that litigation in respect of any matter concerning family, whether divorce, maintenance, custody of children and trial of juvenile offenders should not be viewed in terms of failure or success of legal action, but as social therapeutic problem. No court which is engaged in finding out what is better for the welfare of the family, whether a marriage has broken down or not, who should have custody of children or which spouse needs maintenance, should rest content with the assertions and contentions of the parties and evidence led by them to prove or disprove their contentions and allegations. The court engaged in

this task requires a less formal and more active investigational and inquisitional procedure. In short, this will imply that it is not a litigation in which parties and their counsels are engaged in winning or defeating a legal action but parties, lawyers, social workers, welfare officers and psychiatrists, all are engaged in finding out a solution to the problem or problems engaging the attention of the court. Thus, the concept of family court implies an integrated broad based service to families in trouble. It stipulates that the family court structure should be such as is meant to preserve the family, and to help to stabilize the marriage. Obviously, for such a system, the adversary litigation system is hardly appropriate. Such a system visualizes the assistance of the specialized persons and agencies.

The Family Courts Act, 1984: It is a progressive legislation. It contains 23 Sections. Initially, the Act did not draw the attention of all the State Governments. In course of time, it attracted the attention of several states. Under the Act, Family Courts have been established in some states. The States and High Courts concerned are empowered under the Act to frame necessary rules. The State of A.P. framed the A.P. Family Courts (High Court) Rules, 1995.

The object of the establishment of Family Court is to promote conciliation, and speedy settlement of disputes relating to marriage and family affairs. The High Court of a State is empowered to establish the Family Courts in consultation with the State Government, for those towns and cities whose population exceeds one million. The Judges of the Family Courts are appointed by the State Government with the consent of the High Court. A Family Court may consist of a single Judge or more than one Judge.

The Family Court is higher than the District Court and lower than the High Court.

Qualifications: Following are the qualifications for the appointment as Judge of the Family Court:

1. Atleast 7 years experience as a Judicial Officer.
2. An advocate of High Court having not less than 7 years standing.

3. He must be a member of a Tribunal etc.

The age of retirement of the Family Court Judge is 62 years. Women will be given preference for the appointment as Judges of the Family Courts.

Jurisdiction of the Family Courts: Section 7 of the Family Courts Act, 1984 provides the list. It can exercise jurisdiction in the following cases:

1. A suit or proceeding between the parties to a marriage for a decree of nullity, Restitution of Conjugal Rights, Judicial Separation and Divorce.
2. A suit or proceeding as to the validity of a marriage or as to the Matrimonial status of any person.
3. A suit or proceeding between the parties with respect to the property.
4. Custody and financial support to children.
5. Maintenance of wives, children and old parents.

In *Shyni v. George*, (1997 Ker 231), it was held that wife can implead a close relative of her husband or even a stranger on allegations that the husband had handed over the property to them in a suit for recovery of the property. This would not oust the jurisdiction of the Family Courts.

In *K.A.Abdul Jaleel v. T.A.Sahida* (1997 Ker 269), the expression 'parties to the marriage' was held to include a divorced wife and a petition filed by her for declaration and partition of property jointly acquired by them would be maintainable.

Decree of Family Court – Civil Court's Jurisdiction: A civil suit to declare the decree of family court as null and void is not maintainable (*Shahnaz v. Shirim*, 1995 Bom. 30). Family court's jurisdiction will have precedence over our matrimonial and family law statutes.

Scope of interference in appeal in order of Family Court: No specific procedure has been prescribed by statute to be followed

by Family Court deciding application for custody of minor child. The only thing to be considered by Court is whether the procedure adopted by Family Court was in accordance with principles of natural justice. Paramount consideratioin was welfare of the child (*Dr.Rohit Dandekar v. Dr.Raj Kavitha*, (2004) 1 DMC 216 (Kant.) (DB).

The Family Courts are well established in the State of Karnataka.

QUESTIONS AND HOW TO ANSWER

Q) Objectives for establishing Family Courts. (A.U. Model Q.P. Part-A, Q.5; S.V.U. November 1999, Part-A, Q.8, Marks: 4)

Q) Write a Critical essay on Family Courts Act, 1984 and critically examine jurisdiction of Family Court particularly? (A.U. November 1999, Part-B, Q. 3, Marks: 18)

Q) Write a critical essay on Family Courts. (A.U., July 2000, Part-B, Q.2, Marks: 18).

Q) What is the necessity for establishing Family Courts in India. (N.U. April 1999, Part-A, Q. 10, Marks: 4).

Lecture-XV: Uniform Civil Code

Introduction: India is a Secular State. The word 'Secularism' under the law means, that "the State does not owe loyalty to any particular religion and the state has no religion of its own". It protects all religions viz. Hindu, Muslim, Christian, Parsi etc. who are governed by the respective personal laws. For instance, Hindus are governed by Hindu Marriage Act, 1955; Muslims are governed by the Dissolution of Muslim Marriage Act, 1939; Christians are governed by the Christian Marriage Act, 1872; Parsis are governed by the Parsi Marriage Act of 1939 and so on. According to these personal law legislations, the rules/conditions of marriage, divorce, adoption, maintenance etc. vary (differ) from one religion to the other resulting in so many problems and matrimonial conflicts. For example, a Hindu male cannot have more than one wife. Strict compliance to the principle of 'monogamy' (one must not have more than one spouse) is mandatory under Section 5(i) of the Hindu Marriage Act, 1955. Violation of monogamy (if a person marries again during the life time of his/her spouse) amounts to bigamy under Section 17 and the marriage is void under Section 11 of the Hindu Marriage Act. Further, the person, guilty of bigamy is liable for punishment under Sections 494 and 495 of the Indian Penal Code, 1860. But, according to Mohemmadan (Muslim) Law, a Muslim male can have four wives at a time. If one among the four dies or divorced, he can marry again. If he marries beyond four wives, even then, the fifth marriage is not void, but irregular and it can be rectified/legalised by giving divorce to one of the four wives. May be because of this position in Muslim Law, many non-Muslims, who wish to have more than one wife are getting converted to Islam (Muslim religion). There are so many cases, which came for discussion before the Supreme Court, the maladies under distinct codes for different religions in the same territory of India. Therefore, the Judges, Jurists, Academicians and other distinguished personalities favour and strongly support Uniform Civil Code in India.

Meaning & Scope: The expression "Uniform Civil Code" literally means "Common Code" for all citizens irrespective of their religion". It (Uniform Civil Code) was incorporated in Article 44 of the Indian Constitution under Part-IV: Directive Principles of State Policy.

Article 44 of the Indian Constitution directs, in order to cut across religion, caste and tribes and to build up a homogenous nation that **"the State shall endeavour to secure for the citizens, a uniform civil code throughout the territory of India."**

The preamble of the constitution sets forth the ideals and goals to be achieved by the State for setting up a Social Welfare State. For this purpose, Directive Principles of State Policy are provided for under Part-IV (Articles 36 to 51) of the Constitution. As the directive principles are not enforceable, an individual cannot approach the court (High Court or Supreme Court) for enforcement of Art. 44, which envisages uniform civil code.

Introduction of Uniform Civil Code is not an easy task, since it would be very difficult to bring the persons of different faiths and persuasions on a common platform. However, the Supreme Court in *Ms. Jordan Diengdeh vs. S.S. Chopra*, (AIR 1985 SC 931) and *Mohd. Ahmad Khan vs. Shah Bano Begum*, (AIR 1985 SC 945) held that **"a beginning has to be made if the Constitution is to have any meaning".**

The Supreme Court in its recent landmark decision in: *Sarla Mudgal vs. Union of India*, (1995) 3 SCC 635 directed the Union Government headed by the then Prime Minister, Sri P.V. Narasimha Rao, to take a fresh look at Art. 44, which enjoins the State to secure uniform Civil Code. The Government through the Secretary to Ministry of Law and Justice, filed an affidavit by August indicating the steps taken and efforts made by the Government towards securing the Uniform Civil Code.

But, unfortunately, the Court, while hearing an appeal preferred by one of the accused in the above case made it clear that the **direction given was only an obiter dicta** and that it was **not legally binding on the Government.**

The question involved in *Sarla Mudgal's case* was, whether a Hindu male married under Hindu Law, by conversion to Islam can solemnize a second marriage without dissolving the first marriage? The Court held the marriage illegal and the respondent (husband) was prosecuted for bigamy under Section 494 of the Indian Penal Code.

There are several instances of bigamy by Hindu males by converting to Islam. The court after taking into consideration, the facts and circumstances of the case, held that **"a Hindu marriage continues to exist even after one of the spouses converted to Islam".**

Since 1950, many Governments have come and gone. But, no Government made a serious attempt to implement the constitutional mandate under Article 44. Consequently, the problem today is that many Hindu males, having the spouse living, by embracing Islam are getting married again without any fear of the consequences of bigamy.

Further, the Supreme Court in *Mohd. Ahmad Khan vs. Shah Bano Begum,* AIR 1985 SC 945— held that, a divorced Muslim woman is entitled to claim maintenance under Section 125, Cr.P.C. on the ground that Sec. 125, Cr.P.C. is a general provision and is applicable to all irrespective of their religion. However, the leaders/ heads of the Muslim religion criticised that the Supreme Court through Sec. 125, Cr.P.C. interfered in Muslim personal law and demanded to omit/amend Sec. 125 of the Criminal Procedure Code, 1973. To remove the above conflict, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed. The Act discharges the Muslim male from the liability to maintain his wife, divorced without reasonable cause. She has to rely/depend on her relatives for maintenance.

In view of the above, there is an urgent need for the introduction/ implementation of the uniform civil code, a constitutional mandate under Article 44 of the Constitution.

Reasons: Following are some of the reasons, which support the implementation of the Uniform Civil Code.

1. As the Muslim Law permits four wives at a time, many non-Muslims, who wish to have more than one wife are getting converted to Islam to escape from the consequences of bigamy.

2. Distinct systems of personal law in the matters of marriage, divorce, adoption, maintenance etc. would lead to matrimonial conflicts resulting in socio economic imbalances.

3. Jurists, Judges, Academicians and other welfare organisations strongly support the introduction of Uniform Civil Code.

4. Dr. Tahir Mahmood in his 'Muslim Personal Law, 1977 Edn. pp. 200-202 made a powerful plea for framing a uniform civil code for all citizens of India.

5. At the seminar held on 18.10.1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies, New Delhi, an appeal was made to the Muslim Community to display by their conduct, a correct understanding of Islamic concepts on marriage and divorce.

6. Kuldip Singh, J., while delivering the Judgment in *Sarla Mudgal vs. Union of India,* (1995) 3 SCC 635, said that Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society.

Marriage, succession and like matters are of a secular nature and therefore, they can be regulated by law.

7. Islamic countries like Pakistan, Syria, Iran etc. have taken necessary precautions, while codifying their personal laws without giving room for any criticism or abuse.

8. Finally, academicians and other distinguished personalities in the 'Seminars and Conferences on Hindu Law and Comparative Family Institutions" supported the introduction of Uniform Civil Code in India.

In view of the above, it can be rightly said that there is an urgent need for the introduction/implementation of Uniform Civil Code in India.

QUESTIONS AND HOW TO ANSWER

Q) Uniform Civil Code. (A.U., July 2000, Part-A, Q.7, Marks: 4).

Q) What is meant by Uniform Civil Code? (N.U., April 1999, Part-A, Q.9, Marks: 4).

Ans: Write in brief i.e. in one page.

Q) "The state shall endeavour to secure for the citizens, a uniform civil code throughout the territory of India". (Art. 44 of the Indian Constitution) - Explain the connotations of this directive and impediments to the formulation of "Uniform Civil Code". (N.U., September 1999, Part-B, Q. 14, Marks: 18).

Ans: Write in detail (i.e. the whole lecture on Uniform Civil Code).

Special Note: The Hindu Joint Family is prescribed for study in Family Law-II. However, question from Joint Hindu Family may be asked in Family Law-I also. The student is suggested to refer Lecture-I: The Hindu Joint Family from Family Law-II by the same author